Amicus Curiarum

VOLUME 32
ISSUE 5 MAY 2015

A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

Return to ToC

COURT OF APPEALS

Metro Maintenance Systems South, Inc. v. Thomas Milburn, et al., No. 31, September Term 2014, filed March 30, 2015. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2015/31a14.pdf

APPEALS – FINAL JUDGMENT – REMAND TO ADMINISTRATIVE AGENCY PRIOR TO JUDICIAL REVIEW OF AGENCY DECISION

Facts:

Thomas Milburn applied for unemployment benefits with the Department of Labor, Licensing, and Regulation ("DLLR") after quitting his job with Metro Maintenance Systems South, Inc. ("Metro Maintenance"). Mr. Milburn was unsuccessful at levels of the agency, including at the DLLR Board of Appeals, which denied his request for benefits. Mr. Milburn then filed a petition for judicial review of the agency's decision in the Circuit Court for St. Mary's County, as permitted by the unemployment insurance law.

Prior to any judicial review of the agency's decision by the Circuit Court, the DLLR Board of Appeals filed a motion requesting a remand to the Board. Mr. Milburn consented to the motion. Metro Maintenance opposed the motion and argued that the Circuit Court had the authority to remand only after the court reviewed the agency record and concluded that the agency's findings were not supported by substantial evidence.

The Circuit Court granted DLLR's motion and remanded. In doing so, the Circuit Court stated that the remand would precede the court's consideration of whether the agency's decision was supported by substantial evidence and should be affirmed. Metro Maintenance appealed. The Court of Special Appeals concluded that the remand order was not a final judgment or otherwise appealable and dismissed the appeal as premature.

Held: Affirmed.

The Court of Appeals concluded that the remand order was not a final judgment and was not appealable under Maryland Code, Courts and Judicial Proceedings Article, §12-301. There was no suggestion that the remand order determined and concluded the rights of the parties and the Court considered only whether the remand order terminated the proceedings in a particular court. The Court stated that an order terminates the proceedings in a particular court, and therefore constitutes a final judgment, when it does not anticipate additional proceedings in the same court and prevents the parties from litigating their rights in the particular matter in that court.

The Court reviewed prior cases involving remands to agencies and concluded that the finality of a remand order generally depends on whether the circuit court has conducted judicial review. After a circuit court has conducted judicial review, a remand order is final because the court has determined the legality of the agency's decision and the parties can no longer contest or defend the agency's decision in that court. However, a remand order prior to judicial review is generally not final because it does not determine the legality of the agency's decision, it does not prevent the parties from litigating their rights, and the order anticipates additional proceedings in the circuit court following the remand.

The Court concluded that the remand order in this case did not terminate the proceedings in the Circuit Court and was not a final judgment. The Circuit Court had not yet conducted judicial review of the agency's decision and, therefore, there had been no judicial assessment of the legality of the agency's decision. The Circuit Court anticipated additional proceedings following the remand (the court would conduct judicial review) and, without a judicial determination as to the legality of the agency's decision, Mr. Milburn and Metro Maintenance would be able to defend or challenge the denial of benefits following the remand. Thus, the remand order did not terminate the proceedings because it anticipated additional proceedings in the Circuit Court and did not prevent the parties from litigating their rights in that court. The remand order was merely a temporary delay in the Circuit Court's judicial review of the DLLR Board of Appeal's decision.

The Court analogized the remand order to a dismissal of a complaint with leave to amend, which is not a final judgment. Both types of orders appear to temporarily end proceedings but yet are not final judgments because both types of orders anticipate that the issue at hand will return for determination by the circuit court and neither type of order precludes the parties from litigating their rights in the particular matter at that court. The Court also noted that the potential breadth of additional proceedings at the agency level following remand could not convert the remand order into a final, appealable judgment.

Attorney Grievance Commission of Maryland v. Darlene M. Cocco, Misc. Docket AG No. 1, September Term 2014, filed February 23, 2015. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2015/1a14ag.pdf

ATTORNEY DISCIPLINE — SANCTIONS — DISBARMENT

Facts:

Petitioner, Attorney Grievance Commission ("AGC") of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Darlene M. Cocco. Bar Counsel charged that Cocco, in connection with her representation of Robin L. Jones, engaged in professional misconduct by issuing an invalid subpoena and threatening third parties with suit if they did not comply. It charged Cocco with violating the following Maryland Lawyers' Rules of Professional Conduct: (1) Rule 1.1 (Competence); (2) Rule 3.4 (Fairness to Opposing Party and Counsel); (3) Rule 4.1 (Truthfulness in Statements to Others); (4) Rule 4.4 (Respect for Rights of Third Persons); (5) Rule 8.1 (Bar Admission and Disciplinary Matters); and (6) Rule 8.4 (Misconduct).

The Court referred the Petition to the Honorable Mark S. Chandlee of the Circuit Court for Calvert County to conduct an evidentiary hearing and make findings of fact and conclusions of law. After Cocco failed to file an answer, Bar Counsel filed a Motion for Order of Default. Approximately two weeks after the court granted the Motion, Cocco filed a Motion to Vacate Order of Default and Motion to Dismiss and Request for Punitive Damages Against Plaintiff and Attorney for Plaintiff Lydia Lawless. Cocco neither filed an answer to the Petition nor responded to Bar Counsel's requests for admissions. She did not attend the hearing conducted by Judge Chandlee. At the hearing, Bar Counsel filed a motion pursuant to Maryland Rules 16-756 and 2-424(b) to have the requests for admissions deemed admitted, which the Circuit Court granted. After the hearing, the court denied Cocco's Motion to Vacate and issued its findings of fact and proposed conclusions of law.

The court found that Cocco agreed to pursue claims on behalf of Jones against a Walmart store sometime after she sustained injuries in an accident at the store. Cocco never filed a lawsuit on behalf of Jones in any court. Nevertheless, Cocco attempted to obtain a copy of surveillance video of the incident from Walmart employees, but was informed that a subpoena was required. She returned to the store and demanded that the employees immediately provide her with a copy of the surveillance videotape, threatening them with personal suit. At this time, Cocco presented to the employees a knowingly invalid subpoena from the Circuit Court for St. Mary's County. Although the subpoena was signed by the clerk and bore the seal of the court, Judge Chandlee found the subpoena to be invalid because "no lawsuit had been filed, it was not addressed to any individual and it requested immediate production of evidence."

Bar Counsel began its investigation in response to a complaint filed by Christopher R. Dunn, an attorney for Walmart. Cocco responded to Bar Counsel's initial inquiry, arguing both that the complaint should be dismissed due to the statute of limitations or estoppel and that the subpoena was used to obtain pre-trial evidence to which Jones was entitled. Bar Counsel notified Cocco that the complaint had been docketed, informed her that attorney disciplinary matters are not subject to statutes of limitations, and requested a response to a letter in which Bar Counsel indicated that she had failed to respond to Dunn's core allegation—that she had presented a knowingly invalid subpoena and threatened the store's employees with suit if they did not immediately comply with her demands for the surveillance video. Cocco responded simply that she was unable to recall any additional information about the incident.

Judge Chandlee found, by clear and convincing evidence, that Cocco violated MLRPC 3.4(c); 4.1(a)(1); 4.4(a); 8.1(a) and (b); and 8.4(a), (c), and (d).

Held:

The Court of Appeals accepted the Findings of Fact deemed admitted by the hearing judge. Because Cocco filed no exceptions, the Court also accepted the hearing judge's findings of fact as established for the purpose of determining appropriate sanctions. The Court also agreed with the hearing judge's conclusions that Cocco violated MLRPC 3.4(c); 4.1(a)(1); 4.4(a); 8.1(b); and 8.4(a), (c), and (d). She did so by knowingly presenting an invalid subpoena, threatening Walmart employees with personal suit, failing repeatedly to respond to the allegations that she had threatened third parties with an invalid subpoena, and conducting herself in a manner prejudicial to the administration of justice.

The Court stated that Cocco committed an egregious misrepresentation when she used an invalid subpoena to threaten individual third parties into complying with her demand for information. It observed that Cocco's misrepresentation, threats, and intimidation departed from the model of conduct imposed on lawyers, were a grave transgression and an abuse of her role as an officer of the legal system, and posed a risk to the public perception of the integrity of attorneys in general, specifically of those serving a subpoena. The Court imposed a sanction of disbarment.

Aaron Harrison-Solomon v. State of Maryland, No. 40, September Term 2014, filed March 30, 2015. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2015/40a14.pdf

CRIMINAL LAW – NOT CRIMINALLY RESPONSIBLE – CONDITIONAL RELEASE FROM INPATIENT TREATMENT – CONTINUATION OF CONDITIONS – DUE PROCESS

Facts:

On 15 June 1999, Harrison-Solomon pleaded guilty in the Circuit Court for Prince George's County to two counts of second degree assault. The Court found him not criminally responsible, pursuant to Maryland Code (1982, 1996 Repl. Vol.), Health General Article, § 12-108, and committed him to the Department of Health and Mental Hygiene for inpatient treatment. He was released from impatient treatment by the Circuit Court's order of 23 March 2000, subject to conditions regarding his treatment, living conditions, and activities. The duration of this order, on its face, was three years.

On 21 December 2001, Harrison-Solomon was indicted for several crimes. The Circuit Court rescinded the 2000 order of conditional release and returned him to impatient treatment. Harrison-Solomon was found by a jury guilty, but not criminally responsible, of robbery and use of a handgun in commission of a felony or of a crime of violence.

Upon the recommendation of an Administrative Law Judge (ALJ) of the Maryland Office of Administrative Hearings, the Circuit Court released conditionally Harrison-Solomon on 3 July 2006. The facial duration of this order was through 3 July 2011.

Harrison-Solomon was recommitted to impatient treatment on 17 November 2009 based on the State's petition alleging he violated certain conditions of the 2006 order. An ALJ found, on 13 May 2010, that, although Harrison-Solomon violated the 2006 order of conditional release, he would not be a danger to himself or others if released subject to conditions substantially similar to those in the 2006 order. Therefore, the ALJ recommended that he be released conditionally for the remaining duration of the 2006 Order. On June 15, the Circuit Court released Harrison-Solomon in accordance with the ALJ's recommendations.

On 28 June 2011, five days before the order governing Harrison-Solomon's conditional release was to expire, the Department filed with the Circuit Court an Application for Extension of Conditional Release seeking to extend the terms of the Order for an additional four years, pursuant to Maryland Code (2001, 2008 Repl. Vol.), Criminal Procedure Art., § 3-122. On 31 August 2011, approximately two months after the facial last day (3 July 2011) of the Order of Conditional Release, the Circuit Court granted, without a hearing (none was requested by either party), the Department's Application, extending the conditions of release for an additional four years. Harrison-Solomon did not file an opposition to the Application.

Harrison-Solomon, through counsel, filed on 13 September 2011 a Motion to Alter or Amend under Maryland Rule 2-534. He asserted that the Circuit Court's jurisdiction over him ended on 3 July 2011, at the expiration of the 2006 Order of Conditional Release, and therefore the order entered on August 31 extending his conditional release was invalid. The Circuit Court denied his Motion to Alter or Amend. The Court of Special Appeals, on Harrison-Solomon's direct appeal, affirmed.

The Court of Appeals, on Harrison-Solomon's petition for writ of certiorari, issued a writ to consider this question:

> Where Petitioner was committed to the Department of Health & Mental Hygiene pursuant to a finding that he was not criminally responsible, was subsequently conditionally released, and did not violate any of the conditions of his release, did the circuit court have jurisdiction, after the expiration of the order of conditional release (OCR), to grant a motion to "extend" the OCR filed five days prior to its expiration?

Held: Affirmed.

The Circuit Court retained jurisdiction for a reasonable time to decide the timely-filed application to extend the 2006 order of conditional release, pursuant to Maryland Code (2001, 2008 Repl. Vol.), Criminal Procedure Art., § 3-122.

Jermaine Hailes v. State of Maryland, No. 62, September Term 2014, filed April 17, 2015. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2015/62a14.pdf

APPEALABILITY – MD. CODE ANN., CTS. & JUD. PROC. (1973, 2013 REPL. VOL., 2014 SUPP.) § 12-302(c)(4)(i) – DYING DECLARATIONS – CONFRONTATION CLAUSE

Facts:

In the Circuit Court for Prince George's County ("the circuit court"), the State, Respondent, charged Jermaine Hailes ("Hailes"), Petitioner, with first-degree murder and other crimes. Hailes moved to suppress a pretrial identification on the grounds that the identification was, among other things: (1) hearsay; and (2) testimonial and inadmissible under the Confrontation Clause.

The circuit court conducted a hearing on the motion to suppress and issued an opinion in which the circuit court found the following facts. On November 22, 2010, Melvin Pate ("Pate") was shot once in the right side of his face. The bullet entered Pate's neck and severed C5, the neck's fifth cervical bone. Pate lost the ability to speak and became quadriplegic (*i.e.*, Pate lost the use of all of his extremities). On November 24, 2010, Pate was transferred to the Shock Trauma Center at the University of Maryland Medical Center ("Shock Trauma"). Immediately after Pate arrived at Shock Trauma, doctors told Pate that he had twenty-four hours to live, and Pate's eyes welled up with tears.

On November 26, 2010, two detectives of the Prince George's County Police Department showed Pate a photographic array that included a photograph of Hailes. By blinking hard in response to the detectives' questions, Pate identified Hailes as the shooter. At that time, Pate was restrained to a hospital bed; was on medical life-support equipment, including a ventilator; had several tubes in his body; and, by all indications, believed that his death was imminent. Pate did not die soon afterward, however. In 2011, Pate was released from Shock Trauma. In November 2012, Pate died as a consequence of complications caused by the gunshot wound.

The circuit court granted the motion to suppress, determining that Pate's identification of Hailes fell under the "dying declaration" exception to the rule against hearsay, but was testimonial and inadmissible under the Confrontation Clause. The State appealed, and the Court of Special Appeals reversed and remanded for trial. Hailes filed a petition for a writ of certiorari, which the Court of Appeals granted.

Held: Affirmed.

The Court of Appeals held that the State could appeal from the circuit court's grant of the motion to suppress Pate's identification of Hailes based on a determination that admission of the same would violate the Confrontation Clause. The Court concluded that Md. Code Ann., Cts. & Jud. Proc. (1973, 2013 Repl. Vol., 2014 Supp.) ("CJP") § 12-302(c)(4)(i) ("[T]he State may appeal from a decision of a trial court that excludes evidence offered by the State or requires the return of property alleged to have been seized in violation of the Constitution of the United States, the Maryland Constitution, or the Maryland Declaration of Rights.") is ambiguous in that the word "seized" renders unclear whether CJP § 12-302(c)(4)(i) authorizes the State to appeal only from a trial court's grant of a motion to suppress tangible evidence, as opposed to pretrial identifications and other intangible evidence; CJP § 12-302(c)(4)(i)'s legislative history, however, conclusively establishes that the General Assembly did not intend for CJP § 12-302(c)(4)(i) to authorize the State to appeal only from a trial court's grant of a motion to suppress tangible evidence. Additionally, the Court concluded that CJP § 12-302(c)(4)(i) is ambiguous in that the past-tense phrase "to have been seized in violation of" a constitution renders unclear whether CJP § 12-302(c)(4)(i) authorizes the State to appeal only from a trial court's exclusion of evidence based on an existing alleged constitutional violation—as opposed to an exclusion of evidence based on a determination that the evidence's admission itself would be a constitutional violation; CJP § 12-302(c)(4)(i)'s legislative history, however, conclusively establishes that the General Assembly did not intend for CJP § 12-302(c)(4)(i) to authorize the State to appeal only from a trial court's exclusion of evidence based on an existing alleged constitutional violation.

The Court also held that the circuit court was correct in determining that Pate's identification of Hailes was a dying declaration, and that the circuit court did not clearly err in finding that Pate believed that his death was imminent when he identified Hailes. Pate's mother testified that, on that day, a doctor told her and Pate "that he wouldn't make it" and that "[i]t would be very rare if [Pate] made it past [twenty-four] hours because [the doctor] never had a case that survived from this." According to Pate's mother, immediately after the doctor announced this prognosis, "[t]ears came out of [Pate's] eyes." Pate's mother's testimony supports the circuit court's finding that, immediately after Pate arrived at Shock Trauma, doctors told Pate that he had twenty-four hours to live, and Pate's eyes welled up with tears. Pate's contemporaneous crying tended to prove that he both heard and believed the doctor's prognosis that his death was imminent. The Court concluded that the length of time between a statement and the declarant's death is entitled to little, if any, weight in determining whether a declarant believed that the declarant's death was imminent when the declarant made the statement; thus, the circumstance that Pate died two years after he identified Hailes was entitled to little, if any, weight, and certainly could not render clearly erroneous the circuit court's finding that Pate believed that his death was imminent when he identified Hailes.

The Court reached the same conclusion that the Supreme Court has consistently endorsed for more than a century, and held that the Confrontation Clause does not apply to dying declarations. The Court concluded that its holding was entirely consistent with *Crawford v. Washington*, 541 U.S. 36 (2004) and its progeny. In *Crawford*, *id*. at 54, the Supreme Court stated that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding"; for that

proposition, that Court relied on *Mattox v. United States*, 156 U.S. 237, 243 (1895), which is the earliest case in which the Supreme Court indicated that the Confrontation Clause does not apply to dying declarations. The reason why is clear: Dying declarations were an exception to the common law right of confrontation when the Sixth Amendment was ratified. This accords with *Crawford* and its progeny, in which the Supreme Court has held that the Confrontation Clause applies to testimonial statements of types as to which—in contrast to dying declarations—there was no exception to the common law right of confrontation when the Sixth Amendment was ratified. Indeed, as the Supreme Court recognized in *Crawford*, dying declarations are an anomaly with regard to the Confrontation Clause.

Albert Sublet IV v. State of Maryland, No. 42, September Term, 2014; *Tavares D. Harris v. State of Maryland*, No. 59, September Term, 2014; *Carlos Alberto Monge-Martinez v. State of Maryland*, No. 60, September Term, 2014, filed April 23, 2015. Opinion by Battaglia, J.

Barbera, C.J., Harrell and Adkins, JJ., concur and dissent in No. 42 only.

http://www.mdcourts.gov/opinions/coa/2015/42a14.pdf

EVIDENCE – AUTHENTICATION – ELECTRONICALLY STORED INFORMATION – SOCIAL NETWORKING

Facts:

In *Sublet*, a fight occurred among Albert Sublet, Chrishell Parker, her mother and her sister when, according to the State, Sublet became aggressive while waiting to pick up his girlfriend, Ymani Conner. During cross-examination of Ms. Parker, Sublet's counsel sought to introduce in evidence a four page exhibit alleged to have been a printout from Ms. Parker's Facebook page of a "conversation" among seven different individuals, including Ms. Parker. The first page began on "Saturday" with a statement associated with the profile "Chanica DatBytch Brown", which Ms. Parker identified as Chanica Brown's Facebook username, while the fourth post on the first page was related to the name "Cece Parker", which Ms. Parker identified as her own Facebook name. The posts depicted on the first page were:

> **Chanica DatBytch Brown**
> Saturday via Mobile
> Had a BLAST lastnight… Shit got hectic hahaha ymani has more to come..lmaowack bytch
> Share
> • 2 people like this
>
> * * *
>
> **Camerin Kill'Ent Johnson** Yesssssa lol
> Saturday at 14:15 via mobile
>
> **Cece Parker** yea everytime i see that bitch ima fuck that dirty pussy bitch up . shout out to cam cam u was riden
> Saturday at 15:42 via mobile · 1
>
> **Tyesha Glover** hahahahaha yea whore i agree……..@ cece the whole hood was ridin
> Saturday at 17:24
>
> **Cece Parker** yea.. dey was tho that shit was crazy

Saturday at 20:27 via mobile · 1

On the second and third page were entries that did not come from Ms. Parker's Facebook profile. The fourth page contained six posts; an initial one identified with "Chanica DatBytch Brown", followed by two more posts allegedly from "Cece Parker":

> **Chanica DatBytch Brown** demondra trenice Erica are my godsisters motjer of mines
> Yesterday at 15:43 via mobile
>
> **Cece Parker** ima say this it anit over #fact
> Yesterday at 16:40 via mobile
>
> **Cece Parker** her bf is a dead man walkn
> Yesterday at 16:44 via mobile

* * *

Ms. Parker affirmed that it was her picture next to the entries allegedly authored by "Cece Parker"; however, she asserted she did not write the entries on the fourth page, and she did not understand where they had come from. Ms. Parker explained that she gave her password to Chanica and others who would access her page to write posts under her name. The trial judge, thereafter, sustained the State's objection to admission of the exhibit. Sublet subsequently was convicted of two counts of second degree assault. The Court of Special Appeals affirmed in an unreported opinion.

In *Harris*, the day before a shooting in which Jared C. and a bystander were shot, Keon, a friend of Tavares Harris's, was punched by James, a friend of Jared C.'s,, as part of a plan to rob Keon. Harris, according to the State, planned with others after the fight to shoot Jared C. in retaliation, as reflected in private "direct messages" sent via Twitter and recovered from an iPhone found in Harris's room as well as public "tweets" obtained from an Android phone recovered from Harris's person. At trial, prior to Detective Jesse Grimes's testimony for the State as an expert in the field of forensic examination of cell phones, the State informed the trial court that it would want to move the "direct messages" into evidence, to which Harris's counsel objected. The State proffered that Detective Grimes would testify that, through the use of special software, he had retrieved the "direct messages" from the iPhone and determined that they reflected a conversation between "TheyLovingTc" and "OMGitsLOCO". Detective Grimes explained that when viewing the "direct message" conversation, those messages sent from the iPhone appeared on the right hand side of the screen, while the other party's Twitter name was displayed across the top of the screen and his or her messages appeared on the left hand side of the screen. In the conversation at issue, "OMGitsLOCO" references a "shooting", the need to "avenge keon" and that "they should have neva fucked wit Y2C", (Y2C being the name Harris's group of friends went by) to which "TheyLovingTc" agreed:

@TheyLovingTc

5/17/12 8:53 PM

Ite and tell them bitch ass n[****]s to come to the farm cuz I don't feel safe shooting them right by the police station unless we got the car

5/17/12 9:09 PM

They not gone come we gone try but if not we gone do what we do

5/17/12 9:11 PM

Alright say no more we not goin out like that

5/17/12 9:23 PM

That's what I'm saying

5/17/12 9:25 PM

Yeah man I don't care nomore. I'm just now starting to becomes a real n[***]a. We gon avenge keon.

5/17/12 10:12 PM

hell yeah .

5/17/12 10:16 PM

I started to fall off but ya boi Is back and they should have neva fucked wit Y2C bra it's game ova

The trial judge determined that the "direct messages" were properly authenticated, because, along with the proffer of Detective Grimes's testimony, there was independent verification of the Twitter account from a State's witness who explained that TheyLovingTc was Harris's Twitter profile. Immediately after the trial judge determined that the "direct messages" were admissible the public "tweets" recovered from the Android phone were also admitted; they stated that things would "get real tomorrow" and was accompanied by the same profile photo that had been identified as Harris's:

Tc x TΦ$Δ
@TheyLovingTc
Shit finna get real tomorrow
10:14 PM · 17 May 12

Tc x TΦ$Δ
@TheyLovingTc
Haha i cant do nun but sit back and laugh n[****]s on that grimy shit gotta sneak my yung n[***]a Fuck Probation im all in tomorrow
10:26 PM · 17 May 12

Harris was convicted of first degree assault and the use of a handgun in the commission of a crime of violence. We granted *certiorari* after arguments before the Court of Special Appeals but before that court issued an opinion.

In *Monge-Martinez*, the third Petitioner fought with his former girlfriend, Dorothy Ana Santa Maria, during which Ms. Santa Maria was stabbed. The State sought to introduce Facebook messages received by Ms. Santa Maria that had allegedly been sent by Monge-Martinez expressing remorse for his actions. The first Facebook message was an apology:

> **Carlos Monge**
> Monday, April 23 at 4:21 PM
> Sent from Web
> I wish and one day you forgive me. I got carried away by the anger and your deceit. You didn't lie yesterday, you've been ridiculing me for day and you know it's the truth.

In the second Facebook message Monge-Martinez allegedly stated that he "no longer want[s] to live with this":

> **Carlos Monge**
> Monday, April 23 at [glare] PM
> Sent from Web
> I do not know what I will do I no longer want to live with this.

The third Facebook message admonished Ms. Santa Maria for "deciev[ing]" and "disconcert[ing]" the author of the message:

> **Carlos Monge**
> Monday, April 23 at 4:36 PM
> Sent from Web
> I love you but knowing how you deceived me disconcerted me. I hope you are doing well. I love you.

Ms. Santa Maria, thereafter, identified the exhibits as "Facebook messages that [Monge-Martinez] wrote me", which she had received while in the hospital receiving treatment for her injuries. Ms. Santa Maria also testified that Monge-Martinez had called her after she received the Facebook messages, that when she returned home the day of the incident she discovered a note from Monge-Martinez and that a few weeks later Monge-Martinez had sent her a letter of remorse. The trial judge admitted the Facebook messages over objection. Monge-Martinez was ultimately found guilty of second degree assault and openly carrying a dangerous weapon with the intent to injure. The Court of Special Appeals, in an unreported opinion, affirmed.

Held: Affirmed in all three cases.

In a consolidated opinion, the Court of Appeals delineated a standard for the authentication of evidence obtained from a social networking website prior to its admission into evidence: the trial judge must determine that there is proof from which a reasonable juror could find that such evidence is what the proponent claims it to be. Reflecting upon the history of authentication and its opinion in *Griffin v. State*, 419 Md. 343 (2011), the court opined that the trial court is the "gatekeeper" under Maryland Rule 5-901. The Court explained that the trial court, when addressing social networking evidence, does not have the full panoply of tools at his or her disposal as were available in the traditional sense of authenticating a writing, such as handwriting comparisons, reply correspondences and the physical location of a document. In light of the difficulty of authenticating social networking posts and communications created by the anonymity of the media form and the risk of unauthorized access to profiles, the Court looked, for guidance, to the opinion of the United States Court of Appeals for the Second Circuit in *United States v. Vayner*, 769 F.3d 125 (2014), in which that court, when faced with facts similar to *Griffin*, came to the same conclusion. The Second Circuit instructed that authentication "is satisfied if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification"; thereafter, the jury ultimately is left to make the "determination as to whether the evidence is, in fact, what its proponent claims". *Id*. at 130-31.

Turning to *Sublet*, the Court first noted that under Maryland Rule 5-901(b)(1), which provides that evidence may be authenticated by a witness with knowledge, when such a witness denies knowledge of the item, authenticity by such means necessarily fails. The defense was thus bound by Ms. Parker's answer that she had no knowledge of the posts on the fourth page. The Court noted also that the Facebook posts on the fourth page lacked distinctive characteristics in that they made no reference to the circumstances underlying the case and were disconnected temporally from the posts on the first page that Ms. Parker admitted she had written. The Court, finally, espoused that Ms. Parker having provided her password to others who then accessed her profile and wrote on her behalf was significant in its determination.

In *Harris*, the Court reasoned that the direct messages contained distinctive characteristics of authenticity, such as referencing a plan to avenge Keon, and the author's response thereto, when there was testimony that only two individuals had acquiesced in that plan as well as the fact that the conversation occurred on the same evening the plan had been concocted. With respect to the public tweets, the Court expressed that under Maryland Rule 5-901(b)(3) an item may be authenticated through comparison with previously authenticated specimens. In this case, because the "direct messages" associated with "TheyLovinTc" had been authenticated as having been authored by Harris, the public tweets, written by "TheyLovinTc" at the same time as the "direct messages", were similarly authenticated.

In *Monge-Martinez*, finally, the Court first rejected Monge-Martinez's argument that authentication failed for want of biographical information on the printouts, because the authenticity inquiry is context-specific and such data is not a requirement in every case. The Court then observed that the messages were received shortly after the stabbing when few people knew of it, were written in Spanish (Monge-Martinez's mother tongue), expressed remorse for the incident; the content of the messages also was consistent with other communications from Monge-Martinez.

State of Maryland v. Christopher David Manion, No. 48, September Term 2014, filed April 1, 2015. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2015/48a14.pdf

CRIMINAL LAW – THEFT BY DECEPTION – CRIM. LAW ART. § 7-104(b)

Facts:

Following a bench trial in the Circuit Court for Charles County, Respondent, Christopher David Manion ("Manion") was convicted of five counts of theft by deception under § 7-104(b) of the Criminal Law Article and two counts of conspiracy, and sentenced to a term of sixty-five years, thirty years suspended. Manion's convictions stem from various construction and remodeling contracts entered into between 2009 and 2011 with (1) Sue and Michael Murphy (the "Murphys"), (2) Sharon and Kenneth Lake (the "Lakes"), (3) Clovia and Walter James (the "Jameses"), (4) Geraldine Harsha ("Harsha"), and (5) Pat and Frank Russell (the "Russells").

With respect to each homeowner, Manion falsely represented, either orally or in writing, that he was a licensed contractor or, with respect to the Jameses, a licensed electrician as well. Despite having been paid by each of the homeowners, Manion failed to begin, much less complete, the work for which he was contracted to perform. Moreover, Manion failed to deliver construction materials for which he was paid. Following his inability to perform or deliver materials, Manion offered numerous excuses for his failures, which were cast into doubt by the testimony and other evidence presented at trial. Apart from the extensive list of excuses Manion provided, he made, on several occasions, outright lies to certain homeowners. Ultimately, Manion provided the Lakes, the Jameses, and Harsha last-minute refunds of their money on the eve of trial, or in the case of the Murphys, a partial refund approximately one year after Manion failed to begin construction.

On appeal, Manion's conviction was overturned by the Court of Special Appeals, which concluded, in an unreported opinion, that "there is insufficient evidence to support a reasonable inference that [Manion] had the specific intent to commit theft at the time he obtained monies."

Held: Reversed.

§ 7-104(b) of the Criminal Law Article, theft by deception, provides, in relevant part that "[a] person may not obtain control over property by willfully or knowingly using deception, if the person . . . intends to deprive the owner of the property[.]" As explained in *State v. Coleman*, 423 Md. 666, 673, 33 A.3d 468, 472 (2011), theft by deception is a specific intent crime requiring both an intent to deceive and an intent to deprive. After reviewing the testimony and other evidence presented at trial, the Court of Appeals concluded that the evidence sufficiently

supported an inference that Manion possessed an intent to deceive and to deprive each homeowner of their property at the time of entering into the home improvement contracts or obtaining their money or property.

The Court concluded that the State presented sufficient evidence upon which a reasonable trier of fact could conclude that Manion intended to deceive each homeowner when he falsely represented his status as a licensed contractor. Apart from being plainly false, Manion made no effort to correct the false impressions he created.

The Court went on to explain that from the circumstantial evidence presented regarding Manion's intent, a rational trier of fact could conclude, beyond a reasonable doubt, that Manion intended to deprive each homeowner of their money. With respect to the contracts Manion entered into with the Murphys, the Lakes, the Jameses, and Harsha, the State presented evidence that Manion failed to begin, much less complete, the projects he contracted to perform or deliver construction materials, despite having been paid. Manion's conduct exceeded that of mere non-performance, however. After failing to perform, Manion provided each of the homeowners with numerous representations which the trial court, after considering the evidence before it and weighing the credibility of the witnesses, found to be false or incredulous, including the assertion that Manion needed to leave the country for a funeral, that he was unable to deliver materials because his delivery driver was involved in a fatal accident, that the homeowners' driveways were blocked, or that Manion's car needed to be towed following an accident, despite the fact that the towing company had no records of ever towing Manion's vehicle. It was not until the week prior to trial that Manion offered the Lakes, the Jameses, and Harsha a refund, or in the case of the Murphys a partial refund of less than 15% of the total money owed approximately a year after Manion failed to begin construction.

As for the contracts between Manion and the Russells, the evidence adduced at trial included that nearly $150,000 was paid for services and materials not performed or received. During the two-year relationship, Manion, among other things, failed to obtain permits, pay or obtain certain subcontractors, and offered numerous excuses for his failures to perform, including that he needed to take someone to the hospital for a spider bite or that he caught measles during an alleged outbreak in Southern Maryland. Manion also made several outright false statements to the Russells apart from his false representation as a licensed contractor. Manion, for instance, informed the Russells he would deposit $9,600 paid into an escrow account after failing to begin a certain project, but, based upon bank records produced, only deposited $1,800. In addition, of the $1,800 deposited, Manion used $1,000 personally to obtain an attorney in an entirely unrelated matter. The Court concluded that the circumstances following Manion's failure to perform, when viewed collectively in the context of this case, supported a reasonable inference that Manion entered into the construction contracts with the intent to deprive each of the homeowners of their property. After considering the testimony and other evidence before it, the trial court could have reasonably inferred that Manion intended to deprive his customers of their money.

State of Maryland v. Eric Yancey, No. 56, September Term 2014, filed April 21, 2015. Opinion by Battaglia, J.

McDonald, J., concurs.

http://www.mdcourts.gov/opinions/coa/2015/56a14.pdf

CRIMINAL PROCEDURE – VOIR DIRE – DEFENDANT'S RIGHT TO BE PRESENT AT THE BENCH DURING VOIR DIRE QUESTIONING

Facts:

Eric Yancey was charged with robbery with a dangerous weapon, conspiracy to commit robbery and first degree assault. At the beginning of a jury trial in the Circuit Court for Montgomery County, at approximately 11:00 a.m., Yancey's counsel asked if Yancey could approach the bench during voir dire conferences with prospective jurors, about which the trial judge deferred to the policy of the Sheriffs on duty; the Sheriffs responded negatively, because Yancey was currently in leg irons, and stated that a supervising officer would provide a final answer on the subject. The judge appeared to accede to the Sheriffs response and suggested to Yancey's counsel that, "you can just go back and talk to him then if [he wants] about anything up there". Yancey's counsel stated that not permitting Yancey to approach would send a signal to the jury that would disadvantage him; the judge, in turn, said that "Your client's not prejudiced in any way." The judge, without receiving an answer from the Sheriffs, began voir dire. When Yancey's counsel again advocated for Yancey's presence during any voir dire at the bench, the judge again demurred, stating that, without the Sheriff's permission, "there's nothing we can do", and reiterated that Yancey's counsel could "go back and fill [Yancey] in without making it obvious before we make any decision on that witness if you want to".

During voir dire, one juror, Juror 220, asked to approach the bench in response to a question about whether any prospective juror or a family member had ever been charged with a crime. The judge called Juror 220 to the bench with only the attorneys, without Yancey present, wherein the juror divulged that her two brothers were "brought up on" drug and sexual assault charges and in response to the question, "Would you be able to listen to the facts of this case and render a fair and impartial verdict?" she stated "Yeah"; Juror 220 eventually was selected to serve on the jury.

When trial resumed after lunch, at approximately 2:30 p.m., the Sheriff announced that there was no longer a problem with Yancey approaching the bench, and the judge permitted Yancey's leg irons to be removed. Yancey was permitted to approach the bench, although voir dire had ended. Yancey appealed to the Court of Special Appeals which reversed his conviction and determined that his exclusion from bench conferences during voir dire was not harmless beyond a reasonable doubt.

Held: Affirmed.

The Court of Appeals held that the trial judge's error in excluding Yancey from the voir dire questioning of Juror 220 at the bench, after Yancey requested to be present, was not harmless when Juror 220 was selected to serve on the jury and the State presented no proof of harmlessness. The State had conceded error before the Court of Appeals, which stated that the standard for determining whether the error was harmless or not included that, "Prejudice will not be conclusively presumed. If the record demonstrates beyond a reasonable doubt that the denial of the right could not have prejudiced the defendant, the error will not result in a reversal of his conviction." *Noble v. State*, 293 Md. 549, 568-69, 446 A.2d 844, 854 (1982). The Court first noted that the burden was on the State to prove harmlessness. The Court addressed the State's argument that excluding a defendant from voir dire conferences can be rendered harmless when there was proof that counsel did confer with the defendant by noting that in *Bedford v. State*, 317 Md. 659, 672, 566 A.2d 111, 117 (1989), the Court had previously side-stepped the issue of whether side bars between a defendant and counsel would cure any error and, additionally, that the State did not prove that any such dialogue between Yancey and his counsel had actually occurred. In response to the State's argument that Yancey was only excluded from a small portion of voir dire, the Court reasoned that Yancey was excluded from the entirety of all of the bench conferences regarding voir dire and that, if the time period that Juror 220 was questioned analyzed separately, Yancey's absence for even that brief period was not proven by the State to be harmless. The Court, finally, opined that what proof the State did offer concerning whether Yancey was prejudiced by his exclusion from voir dire bench conferences was largely speculative and did not amount of proof of harmlessness. The Court concluded, therefore, that the State had not proven that the trial judge's error in excluding Yancey from the voir dire questioning of Juror 220 at the bench was harmless.

In re: Tyrell A., No. 49, September Term 2014, filed March 30, 2015. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2015/49a14.pdf

JUVENILE PROCEEDINGS – SENTENCING – RESTITUTION – CO-PARTICIPANT IN CRIMINAL ACTIVITY NOT ELIGIBLE ORDINARILY

Facts:

Two high school students, both of whom were minors at the time of the underlying pugilistic contest, engaged in a fist-fight behind their school. The pre-fight publicity attracted an audience, causing a disturbance in scholastic activities. In the course of the fight, one of the students suffered a broken nose and damaged sinuses.

In a subsequent juvenile proceeding, Petitioner, the nominal victor of the fight, was found by the Circuit Court for Montgomery County, sitting as a juvenile court, to have been involved in the common law offense of affray. In the course of determining Petitioner's involvement, the Court found the injured student to be also a participant in the affray; however, the injured student was not charged with any delinquent act arising from the fight.

Petitioner was placed on probation. One of the conditions of his probation required him to pay restitution for one-half of the medical expenses incurred by the injured student, which requirement Petitioner appealed to the Court of Special Appeals. The intermediate appellate court affirmed the restitution requirement. The Court of Appeals issued a writ of certiorari, *In re: Tyrell A.*, 439 Md. 327, 96 A.3d 143 (2014), to consider the following questions:

> 1) Does the term "victim," defined in Md. Code (2001, 2008 Repl. Vol) Criminal Procedure Art., §§ 11-601(j) and 11-603(a), as "a person who suffers death, personal injury, or property damage or loss as a direct result of a crime or delinquent act," include an individual who sustains personal injury while voluntarily participating in the crime or delinquent act?
>
> 2) Is an individual who sustains personal injury while voluntarily participating in the common law offense of affray a "victim" within the meaning of §§ 11-601(j) and 11-603(a)?
>
> 3) Should the definition of "victim" in §§ 11-601(j) and 11-603(a) be given a different interpretation in juvenile delinquency cases than in criminal cases?
>
> 4) Did the trial court lack authority to order Petitioner to make restitution in this case?

Held: Reversed.

A trial court does not have the authority generally to order, as a condition of probation, a juvenile respondent to pay restitution to a voluntary and willing co-participant in the delinquent conduct for which the respondent is found delinquent, absent exceptional circumstances.

Maryland Casualty Company, et al. v. Blackstone International Ltd., et al., No. 51, September Term 2014, filed April 21, 2015. Opinion by Adkins, J.

Battaglia and Watts, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2015/51a14.pdf

INSURANCE LAW — POLICY INTERPRETATION — INSURER'S DUTY TO DEFEND — ADVERTISING INJURY

Facts:

Robert M. Gray, President of RMG Direct, Inc. ("RMG") and John F. Black, President and Chief Executive Officer of Blackstone International, Ltd. ("Blackstone") commenced a joint venture to market and sell lighting products to people with low vision problems. Gray agreed to work in exchange for remuneration as part of what he termed an oral agreement. During this time, Gray performed multiple tasks without compensation, including: (1) developing the product brand name "Vision Enhance"; (2) creating graphics for use in sales sheets; (3) developing and reviewing packaging and marketing of "Vision Enhance"; (4) contacting low vision experts and sufferers on behalf of the venture, which involved obtaining written testimonials; and (5) procuring placement of a full page color advertisement in an industry journal.

While performing this work for Blackstone, Gray believed that RMG and Blackstone had reached an agreement that Blackstone would create a new division for its low vision products, and that RMG would receive a 7% sales commission for and a 50% equity interest in the low vision products. But the two never reached a written agreement. Although Black had informed Gray that no progress had been made marketing the product, Gray learned that it was stocked and sold in Walmart locations across the United States and that Blackstone had used all, or substantially all, of his ideas, information, input and efforts, including use of the "Vision Enhance" name on the boxes and a substantially similar box design. RMG filed suit against Blackstone and Black in the Circuit Court for Baltimore County, alleging the following causes of action: breach of contract (Count I); promissory estoppel (Count II); unjust enrichment (Count III); quantum meruit (Count IV); intentional misrepresentation (Count V); and accounting (Count VI).

Blackstone has been insured by Maryland Casualty Company and Northern Insurance Company of New York (collectively, "Insurers") for commercial general liability insurance since 2001. Its Commercial General Liability Coverage Form (the "Policy") included coverage for Personal and Advertising Injury Liability. In part, the Policy defined "personal and advertising injury" as "injury . . . arising out of . . . [t]he use of another's advertising idea in your 'advertisement.'" Blackstone and Black wrote to Insurers, requesting coverage and litigation defense. Insurers filed a Complaint for Declaratory Judgment, seeking a judgment that they had no duty to defend the claims.

Following a hearing, the Circuit Court entered summary judgment in favor of Insurers. On appeal, the Court of Special Appeals concluded that the Policy's definition of "advertisement" was implicated and that Gray's advertising ideas could be described as "another's," although Blackstone contended that it owned the rights to the ideas due to its agreement with RMG. The intermediate appellate court also rejected Insurers' contention that RMG did not allege an advertising injury and further concluded that Insurers had waived any defense raised by the Policy's exclusions. The court also relied upon the exclusions as support for its conclusion that absent such exclusions, breach of contract actions fell within the Policy's coverage. The Court of Special Appeals held RMG's unjust enrichment claim did arise out of Blackstone's use of its advertising idea, and, thus, that Insurers were obligated to defend Blackstone against all of RMG's claims.

Insurers petitioned the Court of Appeals for writ of certiorari, asking the Court to decide whether the Court of Special Appeals erred in holding that an advertising injury occurred and that they had waived the Policy's exclusions and also to decide whether the causal connection requirement for advertising injury coverage was satisfied.

Held: Affirmed in part and reversed in part.

The Court concluded that the causal connection requirement between the advertising injury and the claimed damages was not met. Observing that advertising injury must be caused by an offense committed in the course of advertising, the Court held that RMG's alleged injury was not caused by advertisement activity. It stated that although expressed in six counts, the crux of RMG's complaint is that Blackstone failed to accord RMG a share of profits or an equity interest in return for Gray's services as called for in an oral contract between them. Because RMG plainly alleged that Gray and Black formed an oral contract, the Court opined that it cannot be fairly said that RMG suffered injury from the use of advertising materials Gray willingly delivered to Blackstone for that purpose. The wrong RMG alleged was Blackstone's failure to pay RMG a percentage of profits and give it an equity stake in the venture involving the sale of Blackstone's product. The Court noted that to extend comprehensive general liability coverage to breach of contract claims would fundamentally alter the nature of the insurance relationship and effectively render the insurer a surety.

Regarding RMG's unjust enrichment claim, the Court observed that it merely reiterated the facts set forth in the Second Amended Complaint: Gray, on behalf of RMG, did creative work for Blackstone and did not receive the promised dividends. The Court held that the unjust enrichment claim asserted against Blackstone did not qualify as a suit invoking the "Advertising Injury Liability" under the Policy. Notably, the advertising, even though utilizing Gray's ideas, did not injure RMG.

Linda Connors, Individually etc., v. Government Employees Insurance Company, No. 45, September Term 2014, filed April 17, 2015. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2015/45a14.pdf

INSURANCE – POLICY INTERPRETATION – UNINSURED/UNDERINSURED MOTORIST PROVISION – PER PERSON/PER OCCURRENCE AMOUNT "CAPS"

Facts:

On 14 August 2009, Robert and Linda Connors (collectively, the "Connors," the "Plaintiffs," or the "Petitioners"), husband and wife, were walking in their Waldorf neighborhood when a motor vehicle operated by Adam Pond ("Pond") backed out of a residential driveway and struck the Connors. Both of the Connors sustained injuries. Robert's injuries led allegedly to his death over a year later, after the Connors filed a Complaint for Declaratory Judgment against GEICO.

At the time of the accident, the Connors together owned a vehicle insured by Government Employees Insurance Co. ("GEICO") under a Maryland Family Automobile Insurance Policy (the "GEICO policy" or the "policy"). The terms of the policy included underinsured motorist ("UIM") coverage of $300,000 per person/$300,000 per accident. Specifically, the Connors' policy provided that "[t]he limit of liability for Uninsured Motorists coverage stated in the Declarations as applicable to "each person" is the limit of our liability for all damages, including those for care or loss of service, due to ***bodily injury*** sustained by one person as the result of one accident." [Hereinafter, we refer to this provision as "subsection (1)."]. The policy provided further that "[t]he limit of liability for Uninsured Motorists coverage stated in the Declarations as applicable to "each accident" is, *subject to the above provision respecting each person*, the total limit of our liability for all such damages including damages for care and loss of services, due to ***bodily injury*** sustained by two or more persons as the result of one accident." (emphasis added) [Hereinafter, we refer to this provision as "subsection (2)."]. The policy provided also that "[t]he amount payable under this coverage will be reduced by all amounts: (a) Paid by or for all persons or organizations liable for the injury . . . ." Finally, the policy provided "[t]he limit of our liability is the amount of Uninsured Motorists coverage as stated in the Declarations less the amount paid to the ***insured*** that exhausts any applicable liability insurance policies, bonds, and securities on behalf of any person who may be held liable for the ***bodily injury*** or death of the ***insured***."

Pond maintained automobile liability insurance with Allstate Insurance Co. ("Allstate"), limited to $100,000 per person/$300,000 per accident. The record did not divulge the exact monetary amount of damages sustained by Robert and Linda Connors, although GEICO conceded that the total amount would exceed likely all available and collectable insurance. The Connors settled with Allstate for the limits of Pond's liability insurance after GEICO waived its rights of subrogation against Pond. Pursuant to this settlement, Allstate paid $100,000 to Robert (before he died) and $100,000 to Linda.

Then, each of the Connors submitted claims for UIM coverage to GEICO under the terms of their policy. The Connors sought $300,000 total from GEICO. GEICO agreed that the Connors were owed a total of $100,000 under the terms of the policy, but disputed the additional $200,000 claimed by them. Pursuant to an agreement reached between the parties, GEICO paid the Connors the $100,000 it agreed was owed them, with the understanding that the Connors could proceed with their Complaint as to the $200,000 in dispute.

Robert and Linda Connors filed in the Circuit Court for Montgomery County their Complaint against GEICO, together with a motion for summary judgment. GEICO filed an answer, a cross-motion for summary judgment, and opposition to the Connors' motion for summary judgment. After hearing arguments from all parties, the Circuit Court ruled from the bench, granting GEICO's cross-motion for summary judgment and denying the Connors' motion for summary judgment. In a Declaratory Judgment filed later, the Circuit Court determined that (1) the Plaintiffs were insured under the GEICO policy and were entitled to collect UIM benefits under the policy; (2) the GEICO policy was not ambiguous and GEICO was obligated under the policy to pay the Connors $100,000 together in satisfaction of their claims; and (3) GEICO's remaining UIM obligation was calculated by adjusting the Connors' claims to the $300,000 per accident limit, and then subtracting the $200,000 that the Connors received from Allstate. Accordingly, the trial judge agreed with GEICO that it owed the Connors $100,000.

The Court of Special Appeals, in a reported opinion, affirmed the judgment of the trial court. *Connors v. Government Employees Insurance Co.*, 216 Md. App. 418, 421, 88 A.3d 162, 164 (2014). Petitioners filed a Petition for Writ of Certiorari, which we granted to consider the following question: "Do the underinsured motorist provisions of GEICO's insurance contract provide the Petitioners, Linda Connors Individually and Linda Connors as Personal Representative of the Estate of Robert Connors, a limit of underinsured coverage of $300,000 each, subject to an aggregate payment to all Petitioners' claims by GEICO not to exceed $300,000?" *Connors v. Government Employees Insurance Co.*, 439 Md. 327, 96 A.3d 143 (2014).

Held: Affirmed.

Maryland requires that every motor vehicle policy issued in Maryland contain minimum uninsured/underinsured motorist coverage. The Court discussed the general purpose of Maryland's UIM statutory scheme, as well as Maryland's nature as a "gap theory" state.

The Court of Appeals identified two alleged ambiguities in the contract disputed by the parties: the proper interplay between subsections (1) and (2) and the point at which subsection (4) comes into play. The Connors argued that they should calculate each parties' coverage under subsection (1) and credit the payments from Allstate during that stage, leaving $200,000 remaining coverage for Robert and $200,000 remaining coverage for Linda. Their collective $400,000 would then be subject to the $300,000 per accident "cap," rendering GEICO liable for $300,000. GEICO, on the other hand, would have "credited" the payments from Allstate *after*

the Connors' individual remaining coverage amounts are consolidated and subjected to the "cap" of subsection (2). Accordingly, the $200,000 paid by Allstate would be credited against the $300,000 "cap" of subsection (2), leaving GEICO liable for $100,000.

The Court concluded that the policy was not ambiguous and that the terms of the policy could be enforced as a matter of law. The Court concluded that, based on the "subject to" language contained in subsection (2), that subsection referred to subsection (1) by its terms and ensured therefore that something about subsection (1) impacts the meaning of subsection (2). The Court discussed a hypothetical policy to illustrate the proper interplay between subsections (1) and (2) before discussing the point in time at which subsection (4) impacted the calculation. The Court of Appeals concluded that, once the parties get through the calculations and caps of subsection (1) and (2) and arrive at a penultimate number, they are required at that point by subsection (4) to "credit" payments made by tortfeasors.

David Payne, et ux v. Erie Insurance Exchange, et al., No. 38, September Term 2014, filed March 30, 2015. Opinion by McDonald, J.

Harrell, Battaglia, and Watts, JJ., concur.

http://www.mdcourts.gov/opinions/coa/2015/38a14.pdf

AUTOMOBILE LIABILITY INSURANCE – OMNIBUS CLAUSE – SECOND PERMITTEE

Facts:

Alan Dwyer owned a Subaru insured by a policy in his name with Erie Insurance Exchange. He gave his adult daughter Karen, who lived with him and his wife, unrestricted use of the car. Her then-boyfriend Ameen Abdulkhalek, however, was expressly forbidden to drive the car. One day, Karen Dwyer was feeling ill, and she asked Mr. Abdulkhalek to drive the Subaru and pick up two of their children from school. The school was a few blocks away from the Dwyer residence.

Mr. Abdulkhalek first drove to a gas station for an unknown purpose, and then made a U-turn on Route 202, where he collided with a car driven by David and Claudia Payne. Had he driven straight to the school, he would not have been on Route 202.

Mr. Dwyer's insurance policy included an omnibus clause in the liability coverage section that read, in relevant part:

> "**Anyone we protect**" means:
>
> 1. "**you**" or any "**relative**" using an "**auto we insure**,"
>
> 2. any person using, or any person or organization legally responsible for the use of, an "**owned auto we insure**." This use must be with "**your**" permission unless the use is by a "**relative**;"

The Paynes filed a tort action against Erie Insurance and Mr. Abdulkhalek, among others. The Paynes then filed a declaratory judgment to determine whether the Erie policy covered Mr. Abdulkhalek for the accident.

The Circuit Court determined that Mr. Abdulkhalek's use of the car was not covered by the Erie policy, granting Erie's motion for summary judgment and denying the Paynes' motion for summary judgment. The Court of Special Appeals affirmed, holding that Mr. Abdulkhalek was not covered for two reasons: (1) the "first permittee" under the omnibus clause – Karen Dwyer – was not in the car at the time of the accident, and (2) even if Mr. Abdulkhalek qualified as a "second permittee," he exceeded the scope of any arguably permitted use when he failed to drive directly to the school.

Held: Affirmed.

The Court of Appeals affirmed the ruling below, solely on the ground that Mr. Abdulkhalek exceeded the scope of his permitted use of the car.

The Court reviewed prior cases where the named insured authorized another person – a first permittee – to use the vehicle, but prohibited or limited its use by others. In those cases, a second permittee may nevertheless have coverage under an omnibus clause in certain circumstances.

The Court held that, in order for another driver to come within the scope of "use" of the car by the first permittee, the cases require **either** (1) that the first permittee be in the car while the second permittee operates it, **or** (2) that the second permittee drives the car with the permission of, and for the benefit of, the first permittee.

The Court reasoned that the omnibus clause covers a second permittee who uses the car consistently within the scope of permission given to the first permittee. When the first permittee is in the car, it is being used by that person, even if driven by another. However, the second permittee may also be covered if the car is operated for the first permittee's benefit without the first permittee's presence. But coverage does not extend to the second permittee who uses the car outside that scope.

In this case, Karen Dwyer asked Mr. Abdulkhalek to drive to the school and bring the children home to the Dwyer residence. Instead, he drove to the gas station first. Nothing in the undisputed facts – or the reasonable inferences that could be drawn from those facts – supported the conclusion that Mr. Abdulkhalek's trip to the gas station was for the benefit of Ms. Dwyer, the first permittee. Because he went outside the scope of permitted use, which was to benefit Ms. Dwyer, he was not covered by the omnibus clause.

State of Maryland, et. al v. G & C Gulf, Inc., Misc. No. 4, September Term 2014, filed April 22, 2015. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2015/4a14m.pdf

JUDICIAL REVIEW – RIPENESS – THREAT OF PROSECUTION

Facts:

G & C Gulf, Inc. ("G & C Gulf"), a towing company located in Montgomery County, brought a declaratory judgment action against the State, the Governor, the Attorney General of Maryland, the State's Attorney for Montgomery County and Montgomery County, alleging that towing statutes enacted by the General Assembly in 2012, currently codified as Section 21-10A-04(a)(3), which provides that towing companies must notify owners, any secured parties, and insurer of records for removed vehicles within seven days of a tow and Section 21-10A-04(a)(7), which prohibits towing companies from the employment of "spotters" to report the presence of unauthorized cars for towing, were unconstitutional. A violation of Section 21-10A-04(a) is a criminal offense and subjects a violator to a fine or imprisonment.

At trial in the Circuit Court for Anne Arundel County, the Assistant Attorney General, representing the State Defendants, orally moved for summary judgment, arguing that the case did not present a justiciable controversy, because there was no actual or threatened prosecution of G & C Gulf under the statute. In a colloquy with the Circuit Court Judge, The Assistant County Attorney for Montgomery County proffered that "we are enforcing [the statute] now because it is the law", and answered in the affirmative the judge's question as to whether the Assistant County Attorney was "ready to charge and prosecute or at least take to the Commissioner's Office the Plaintiff". The Circuit Court ultimately denied the oral motion for summary judgment and granted G&C Gulf's request for declaratory judgment and injunctive relief.

The State noted an appeal, and the Court of Special Appeals certified a question of law to the Court of Appeals to determine if the contested statute was unconstitutional. The Court reformulated the question of law for response by the parties to include, among two other questions, the question of if there was a justiciable controversy between the parties.

Held: Reversed.

The Court determined that there was no justiciable controversy in the present case because G & C Gulf had not been prosecuted under the statute, nor had it alleged or proven that there was a credible threat of prosecution for the acts proscribed by the statute.

The Court looked to prior jurisprudence, particularly, *Hammond v. Lancaster*, 194 Md. 462, 76 A.2d 582, 584 (1950), and its progeny. The Court discussed *Hammond*, and reiterated that a

hypothetical threat of prosecution under a penal statute is not sufficient to constitute a justiciable controversy. The Court concluded that the statement by the Assistant County Attorney did not meet the *Hammond* standard because it did not constitute a specific threat against G & C Gulf.

Estela Espina, et al. v. Steven Jackson, et al., No. 35, September Term 2014, filed March 30, 2015. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2015/19a14.pdf

LOCAL GOVERNMENT TORT CLAIMS ACT – DAMAGES CAP – CJP § 5-303

Facts:

On August 16, 2008, Manuel Espina ("Espina") was shot and killed by Steven Jackson ("Jackson"), a Prince George's County police officer inside Espina's apartment building where Jackson worked a secondary employment detail as a security guard. Petitioners, Espina's estate, Estela Concepcion Jacome–Espina, Espina's surviving spouse ("Estela"), and Manuel de Jesus Espina–Jacome, Espina's son ("Manuel"), filed against Jackson and the County (collectively, "Respondents") survival and wrongful death actions arising out of Espina's death, as well as a claim on behalf of Manuel for a violation of his constitutional rights arising out of his treatment and arrest following the fatal shooting of his father. After a twenty-three day trial, Petitioners obtained a jury verdict in the amount of $11,505,000, which was reduced to a judgment and entered against both Jackson and the County, jointly and severally. On Respondents' motion for remittitur, the trial court, looking to the Local Government Tort Claims Act, Md. Code (1974, 2013 Repl. Vol., 2014 Supp.), § 5-301 et seq. of the Courts & Judicial Proceedings Article ("CJP"), "limits on liability," first reduced the judgment as against the County to $805,000. Subsequently, on Respondents' motion and in light of the Court of Special Appeals's opinion in *Leake v. Johnson*, 204 Md. App. 387, 40 A.3d 1127 (2012), the Circuit Court further reduced the judgment entered against the County to $405,000. Based on the jury's finding of malice and pursuant to CJP § 5-302(b)(2)(i), the Circuit Court left intact the full jury award as to Jackson. On appeal, the Court of Special Appeals affirmed the judgment in part, and reduced the award entered against the County to $400,000. Petitioners thereafter filed a petition for certiorari with this Court, which was granted.

Held: Affirmed.

The LGTCA provides that "[e]xcept as provided in subsection (c) of this section, a local government shall be liable for any judgment against its employee for damages resulting from tortious acts or omissions committed by the employee within the scope of employment with the local government." CJP § 5-303(b)(1). The Court of Appeals held that, based upon the plain language and a review of the legislative history of the statute, the LGTCA limits the amount of damages that a local government must pay for "tortious acts or omissions committed by the [local government's] employee[s] within the scope of employment" arising out of violations of Article 24 of the Maryland Declaration of Rights.

The Court also held that application of the LGTCA damages cap to state constitutional claims does not violate the supremacy of the state constitution, nor Article 19 of the Maryland Declaration of Rights. Article 19 essentially "protects two interrelated rights: (1) a right to a remedy for an injury to one's person or property; [and] (2) a right of access to the courts." *Piselli v. 75th St. Med.*, 371 Md. 188, 205, 808 A.2d 508, 518 (2002). In reviewing an Article 19 challenge to a legislative restriction on a remedy, the Court applies a reasonableness test. Where the Legislature has determined that the responsibility of the local government entity to indemnify its employee should be limited to $200,000 per individual claim and $500,000 per occurrence, the decision is a matter of policy and it is not unreasonable.

Finally, the Court held that for the purposes of the LGTCA damages cap, "wrongful death claims, which are derivative of another person's claim of injury [the survival claim], are considered collectively as one individual claim." *Leake*, 204 Md. App. at 416, 40 A.3d at 1144. Therefore, the Court of Appeals affirmed the judgment of the Court of Special Appeals aggregating Estela and Manuel's wrongful death claims with the estate's survivorship claims for the purpose of limiting recovery to $200,000. Manuel's own constitutional claim, however, constitutes "an individual claim" under the LGTCA separate from the survivorship/wrongful death claims. Thus, the Court concluded that Petitioners' recovery against the County is limited to $400,000.

Baltimore County Maryland, et al. v. Carroll Thiergartner, No. 44, September Term 2014 and *Jeffrey Walters v. Baltimore County Maryland*, No. 58, September Term 2014, filed April 20, 2015. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2015/44a14.pdf

WORKERS' COMPENSATION BENEFITS – PRESUMPTION ACCORDED PUBLIC SAFETY EMPLOYEES – OFFSET FOR RETIREMENT BENEFITS – DEFERRED RETIREMENT OPTION BENEFITS

Facts:

The State Workers' Compensation Act includes a special presumption for public safety employees that certain medical conditions are the result of an occupational disease and are compensable under the Act. Benefits paid as a result of that presumption, however, are capped such that the weekly total of those benefits and any retirement benefits received by the individual do not exceed the individual's average weekly salary; if the total exceeds the average weekly salary, the workers' compensation benefits are reduced by the amount of the excess. Labor & Employment Article ("LE"), §9-503.

These two consolidated cases each concerned a retired Baltimore County firefighter who had elected to participate in an optional retirement program offered by the County known as the Deferred Retirement Option Program ("DROP"). Under the DROP, an employee eligible for retirement may delay retirement in return for additional benefits that can be received as a lump sum upon retirement or as part of an enhanced monthly retirement payment. Baltimore County Code, §5-1-302.

In both cases, the retired firefighter opted to receive the DROP benefit as a lump sum upon retirement. In both cases, some years later, the retiree was awarded workers' compensation benefits under the special presumption for public safety employees. As a result, the offset provision in LE §9-503 would potentially limit the amount of the workers' compensation benefit received by the retired firefighter, depending on the amount of retirement benefits that he received. Thus, in both cases, the question arose as to whether the lump sum DROP benefit should be included in the offset computation and, if so, how.

Thiergartner: In Mr. Thiergartner's case, the Workers' Compensation Commission included the DROP lump sum in the offset computation by pro-rating it over the length of the retiree's retirement. It did so by using a figure for the higher monthly benefit that Mr. Thiergartner would have received if he had not elected to receive the lump sum DROP benefit, and converting that monthly figure to a weekly one for purposes of the offset formula. The Circuit Court for Baltimore County affirmed that decision. Baltimore County appealed the Circuit Court's decision to the Court of Special Appeals. The Court of Special Appeals held that only recurring weekly retirement benefits should be included in the offset computation and concluded that the

DROP lump sum should not be included because it was paid to Mr. Thiergartner years before he was awarded workers' compensation benefits. 216 Md. App. 560 (2014).

Walters: In Mr. Walters' case, the County did not bring up the issue of the lump sum as part of the offset computation before the Commission. Instead, it initially paid Mr. Walters no workers' compensation benefits as a result of the award on the ground that his weekly workers' compensation benefit would be offset in full for many weeks under the offset computation until weekly credits for the DROP lump sum totaled the amount of the lump sum. Litigation ensued and the County was ordered to pay workers' compensation benefits to Mr. Walters while the effect of the lump sum in the offset computation was resolved. The Circuit Court for Baltimore County eventually agreed with the County's method of computing the offset – i.e., the worker's compensation benefits would be offset by an amount equal to whatever "gap" existed between the retiree's weekly salary and other retirement benefits until the cumulative offsets equaled the lump sum DROP payment. Mr. Walters appealed that decision to the Court of Special Appeals, but the County filed a petition for certiorari before that court heard argument.

The Court of Appeals granted petitions for a writ of certiorari filed by Baltimore County in both cases.

Held:

The lump sum DROP payment is a "retirement benefit" that must be included in the offset computation under LE §9-503.

The offset computation involves a comparison of "weekly" figures, but only the workers' compensation benefits are expressed as a weekly amount. Thus, the statute contemplates the conversion of salary (which may be expressed as an anuual or monthly or bi-weekly amount) and retirement benefits (which may be paid on a monthly basis or at other intervals) to weekly figures. Accordingly, the lump sum DROP payment must be converted to a weekly figure for purposes of the offset computation. Under a principle employed by the Court in *Blevins v. Baltimore County*, 352 Md. 620 (1999) – which concerned another offset provision in the Workers' Compensation Act – the figures used in the offset formula should be considered with respect to the time periods to which they relate.

Ascribing the lump sum only to the week in which it was paid – as the retirees urged and as the Court of Special Appeals did in *Thiergartner* – would treat a DROP lump sum differently from other retirement benefits and is contrary to the principle stated in *Blevins*. As indicated, the statute contemplates conversion of the benefits figure to a weekly amount for the period of time to which it relates – here, the entire period of the employee's retirement.

The County's method of computation (adopted by the Circuit Court in *Walters*), while it does pro-rate the lump sum over a period of weeks, front-loads the offset by using the weekly workers' compensation benefit for the rate at which the lump sum is pro-rated – a figure that bears no relation to the retirement benefits or period of retirement. This is illogical as illustrated

by the fact that Mr. Thiergartner's lump sum – which is considerably larger than Mr. Walters' – would be pro-rated at a slower rate than Mr. Walters' lump sum.

The more accurate and fair way to pro-rate the lump sum DROP payment would be to adopt a method like the Workers' Compensation Commission did in Mr. Thiergartner's case (affirmed by the Circuit Court), which would look to the enhanced monthly benefit that the retiree would have received if he had not elected a lump sum and convert that figure to a weekly amount.

Anne Arundel County, Maryland v. Steve Bell, et al., No. 29, September Term 2014, filed April 21, 2015. Opinion by Harrell, J.

Battaglia, Adkins, and McDonald, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2015/29a14.pdf

ZONING – COMPREHENSIVE ZONING – LEGISLATIVE ACTION – LITIGATION – STANDING

Facts:

Bill 12-11, a comprehensive zoning ordinance adopted in 2011 by the County Council for Anne Arundel County ("the County"), embraced two districts in the County comprising approximately 59,045 individual parcels or lots totaling 4,265 acres in area. Of those 59,045 individual parcels or lots, Bill 12-11 changed the previous zoning classifications of 264 parcels or lots and maintained essentially the pre-existing zoning of the rest. Bill 12-11 was the culmination by local government of a 5-year comprehensive and thorough consideration of the zoning in the Districts.

The adoption of Bill 12-11 was challenged by various Anne Arundel County property owners and community associations ("the Citizens"), who objected to some, but not all, of the rezonings. Two suits (an Amended Petition for Judicial Review or, in the Alternative, for a Writ of Administrative Mandamus and a Complaint for Declaratory Judgment) were filed in the Circuit Court for Anne Arundel County, which were consolidated. The Citizens challenged the rezoning of multiple parcels of land, alleging that the County engaged in illegal spot and contract zoning with regard to those rezonings and failed to provide the public with the required notice of the proposed zoning changes.

Several Anne Arundel County property owners and ground leaseholders whose properties had been rezoned to classifications desired by them (collectively, with the County, referred to as "Petitioners") intervened to protect their interests. Petitioners moved to dismiss the Citizens' suit, arguing, among other things, that the Citizens lacked standing. The Circuit Court granted Petitioners' motion to dismiss, concluding that the Citizens lacked standing because, irrespective of the proximity of any of the Citizens' properties to any of the rezoned properties, they failed to meet the burden of proving special aggrievement.

On direct appeal, the Court of Special Appeals disagreed with the Circuit Court, concluding that the Citizens enjoyed property owner standing to challenge Bill 12-11. Relying on *120 W. Fayette St., LLLP v. Mayor and City Council of Baltimore*, 407 Md. 253, 964 A.2d 662 (2009) ["*Superblock I*"] and *Long Green Valley Association v. Bellevale Farms, Inc.*, 205 Md. App. 636, 46 A.3d 473, *aff'd on other grounds*, 432 Md. 292, 68 A.3d 843 (2013), the intermediate appellate court concluded that the *prima facie* aggrievement standards of property owner

standing principles apply to challenges to comprehensive zonings, as well as administrative and executive land use decisions. After examining the allegations of owners of several discrete parcels, the Court of Special Appeals concluded that at least some of the Citizens had alleged harm sufficient to show that the Citizens were specially aggrieved. Because that court concluded that at least one of the Citizens was *prima facie* aggrieved, based solely on the proximity of his/her property to a single property rezoned in Bill 12-11, all of the Citizens had standing with respect to the select parcels rezoned in Bill 12-11.

Petitioners, in their successful petition for a writ of certiorari to us, asked us to consider: (1) "Whether the *prima facie* aggrievement standard established in [*Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137, 230 A.2d 294 (1967)] should be expanded beyond challenges to administrative land use decisions to include challenges to comprehensive zoning?"; (2) "Whether the "almost *prima facie*" standard as established in [*Ray v. Mayor and City Council of Baltimore*, 430 Md. 74, 59 A.3d 545 (2013)] should be expanded beyond challenges to administrative land use decisions to include challenges to comprehensive zoning?"; and (3) "Whether noise from a predicted increase in traffic constitutes "special damages"?"

Held: Reversed, with directions to affirm the Circuit Court.

Plaintiffs wishing to challenge in Maryland courts the legislative action of adoption of a comprehensive zoning ordinance are required to demonstrate taxpayer standing—a standing doctrine required for challenges to legislation. The doctrine of property owner standing (i.e., a proximity-driven standing doctrine) is not the appropriate basis upon which a judicial challenge to a comprehensive zoning legislative action may be maintained.

The Court of Appeals distilled the first two certiorari questions into the following: are the principles of property owner standing applicable to plaintiffs maintaining a judicial challenge to the adoption of a comprehensive zoning ordinance, as has been the standard by which judicial challenges to quasi-judicial and other administrative "land use" actions have been measured?

The Court compared quasi-judicial and administrative land use decisions with comprehensive zoning actions. Although comprehensive zoning is legislative fundamentally and no significant quasi-judicial function is involved, quasi-judicial processes and administrative land use actions result from a decidedly un-legislative process (including typically a deliberative fact-finding process, which entails the holding of at least one evidentiary hearing (generally), factual and opinion testimony, documentary evidence, cross-examination of the witnesses, and objections to the weighing of evidence) which results in a particularized set of written findings of fact and conclusions of law as to the zoning proposal for the parcel or assemblage in question.

Bearing in mind the differences between various zoning actions, the Court turned to examine the two standing doctrines available to complainants by which they might maintain suits regarding land use actions generally: the doctrines of property owner standing and taxpayer standing.

The Court began its discussion of property owner standing with the requirements and historical underpinnings of the doctrine, examining *State Center, LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 92 A.3d 400 (2014), *Ray*, and *Bryniarski*. The Court elaborated then on the outer limits of the variety of land use decisions to which property owner standing applies. The Court discussed in depth the trilogy of *Superblock* cases, and especially *Superblock I* and *120 West Fayette St., LLLP v. Major and City Council of Baltimore*, 426 Md. 14, 43 A.3d 355 (2012) [hereinafter "*Superblock III*"], in addition to *State Center*. The Court of Appeals deduced from *Superblock I*, *Superblock III*, and *State Center* that the doctrine of property owner standing may apply to administrative land use decisions and other land use actions undertaken as executive functions. The Court has not applied heretofore the doctrine to purely legislative processes and actions, nor does the Court's body of case law on the subject warrant applying the doctrine to judicial challenges to legislative acts reached through solely legislative processes.

Finally, the Court of Appeals explained why further expansion of the property owner standing doctrine to the purely legislative process and act of comprehensive zoning is ill-advised. The Majority expressed reticence to construe standing doctrines so broadly as to eviscerate the doctrine of property owner standing, as would be the case if, hypothetically, thousands of plaintiffs with the benefit of property owner standing could have standing to challenge comprehensive zoning legislation. The Court observed instances in *Ray* and *State Center* where similar policy concerns underscored the court's analysis of standing.

The Court of Appeals then proceeded to discuss the doctrine of taxpayer standing, which the Court identified as the standing doctrine that challengers to comprehensive zoning ordinances must satisfy. The Court first discussed the requirements and historical underpinnings of the doctrine of taxpayer standing. To establish eligibility to maintain a suit under the taxpayer standing doctrine, a complainant must allege two things: (1) that the complainant is a taxpayer and (2) that the suit is brought, either expressly or implicitly, on behalf of all other taxpayers. A party satisfies the special interest, also called special damage, standing requirement by alleging both 1) an action by a municipal corporation or public official that is illegal or *ultra vires*, and 2) that the action may injuriously affect the taxpayer's property, meaning that it reasonably may result in a pecuniary loss to the taxpayer or an increase in taxes. Naturally, there must be a nexus between the showing of potential pecuniary damage and the challenged act, which is true not only for the complainant, but also all similarly situated taxpayers.

The Court then discussed some of the instances in which taxpayer standing applies, including cases pertaining to executive, administrative, or quasi-land use actions as well as challenges to legislation generally. The Court concluded, after examining *Boitnott v. Mayor and City Council of Baltimore*, 356 Md. 226, 738 A.2d 881 (1999), among other cases, that taxpayer standing is the appropriate standing doctrine that challengers to comprehensive zoning ordinances must satisfy in order to maintain their suit.

Finally, the Court analyzed the Citizens' suit in light of the requirements of taxpayer standing. The Court assumed that at least two of the Citizens were taxpayers, and the Citizens alleged that the actions taken by the County in adopting the zoning reclassifications in Bill 12-11 were illegal; however, the Citizens did not satisfy the requirements of taxpayer standing because they

did not allege that the illegal action would result in a pecuniary loss or an increase in taxes. Because the Citizens did not allege properly that they would suffer the requisite harm, the Court did not determine whether the Citizens alleged sufficiently that their suit was brought on behalf of all other taxpayers similarly situated.

Anne Arundel County, Maryland, et al. v. Harwood Civic Association, Inc., et al., No. 39, September Term 2014, filed April 21, 2015. Opinion by Harrell, J.

Battaglia, Adkins, and McDonald, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2015/39a14.pdf

ZONING – COMPREHENSIVE ZONING – LEGISLATIVE ACTION – LITIGATION – STANDING

Facts:

Bill 44-11, a comprehensive zoning ordinance adopted in 2011 by the County Council for Anne Arundel County ("the County"), embraced two districts in the County, referred to colloquially as "South County." Property owners desiring rezoning were given an opportunity to submit applications to the County. The County's Office of Planning and Zoning ("OPZ") evaluated the applications in light of the recommendations of County's comprehensive land use master plan (the "General Development Plan," or "GDP"), made a recommendation as to each application, and incorporated its various other recommendations in a draft of what became Bill 44-11. The County Council adopted Bill 44-11, with certain amendments to the draft bill submitted by the OPZ and not vetoed by the County Executive, after which point Bill 44-11 became "final" and effective.

Several non-profit community associations and individual property owners (collectively, the "Protestants" or "Respondents") filed in the Circuit Court for Anne Arundel County a complaint for declaratory judgment, in which they sought specifically a declaration that certain provisions of Bill 44-11 were void because assertedly they granted illegal spot zoning and were inconsistent with the recommendations of the GDP. In the Complaint, the individual property owners each alleged that they owned property and resided near or adjacent to one of the properties rezoned by Bill 44-11 and that the value of their property and enjoyment thereof would be reduced substantially as a result of the rezoning. Owners of some of the properties rezoned by Bill 44-11 (collectively, the "Defendants") filed motions to intervene, all of which were granted.

The County and several Defendants filed motions to dismiss the complaint in which they challenged the Protestants' standing. One of the intervening Defendants argued in a motion to dismiss that the Protestants did not allege facts sufficient to establish either taxpayer standing or property owner standing. In their response to that motion, the Protestants disclaimed taxpayer standing and argued instead that they maintained property owner standing.

The Circuit Court dismissed the Protestants' amended complaint. In a footnote of the trial judge's opinion, he recognized that Protestants conceded that they did not claim to have taxpayer standing, and he then considered whether they satisfied property owner standing. He concluded,

based on his reading of *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137, 230 A.2d 289 (1967), that all Protestants lacked standing.

The Protestants filed a Second Amended Complaint, adding additional plaintiffs and defendants yet again. The Protestants reiterated generally the proximity of their properties to the rezoned properties, and alleged further various discrete injuries, including reduced property values, reduced enjoyment of the properties, increased traffic, increased noise and light pollution, fear of damage to trees and mailboxes on their properties as a result of increased traffic, damage to the rural nature of the properties, increased run-off from storm water, and the pressure to permit additional and more intense commercial uses in the future. One Protestant, Shirley Harrison ("Ms. Harrison"), who owns and resides on a property "adjacent to" a property rezoned in Bill 44-11, reiterated her allegations that enjoyment of her property would be reduced substantially and that the rezoning would cause an increase in traffic. She alleged further that she feared that her property taxes would increase due to the rezoning on the adjacent rezoned property. In response to the Second Amended Complaint, some of the Defendants, including the County, filed new motions to dismiss, asserting that the Protestants lacked standing. The Protestants, in their opposition to the motion to dismiss the Second Amended Complaint filed by the County, reiterated, among other things, their argument that their allegations of special aggrievement were sufficient to establish their standing.

One of the Defendants focused pointedly in its motion to dismiss on the allegations of Ms. Harrison. They argued that Ms. Harrison's allegations failed to satisfy the special damage requirements of *Bryniarski* and that she failed to allege that she would be affected specially in a way different from that suffered by the public generally. Finally, the Defendant maintained that, if Ms. Harrison was arguing that she maintained taxpayer standing, she did not allege sufficient pecuniary losses. The Protestants filed an opposition to that motion to dismiss, but did not address in any way the arguments regarding taxpayer standing, nor did they disavow explicitly their earlier disavowal of taxpayer standing. The Protestants also opposed another motion to dismiss, where they maintained again that they enjoyed standing as "adjoining property owners" and relied indiscriminately on cases discussing both property owner standing and taxpayer standing.

The Circuit Court dismissed the Second Amended Complaint. Regarding Ms. Harrison, the trial judge noted, in a footnote, that "an increase in property value by definition is not 'harm' and that a tax increase for more valuable property does not constitute a viable zoning complaint." The Circuit Court went on to conclude that Ms. Harrison's allegations were too generalized to satisfy the requirement of "special harm." The trial judge concluded that most of the Protestants lacked standing to challenge Bill 44-11, but two enjoyed property owner standing because of their allegation that the rezoning of a nearby parcel "will result in a loss of or a deterioration of the wildlife habitat and will destroy or drive off the currently abundant wildlife there." He dismissed, however, the Second Amended Complaint as to all of the Protestants because he concluded that they failed to state a claim upon which relief could be granted.

The Protestants appealed to the Court of Special Appeals, where they argued again that they enjoyed property owner standing by virtue of their proximity to various rezoned parcels. The

parties did not argue taxpayer standing before the intermediate appellate court, nor did that court discuss taxpayer standing in the process of concluding that the doctrine of property owner standing applies to declaratory judgment actions challenging comprehensive zoning legislation. The Court of Special Appeals concluded that the Protestants did state a claim upon which relief could be granted and remanded the case for further proceedings in light of its opinion in *Bell v. Anne Arundel County, Md*., 215 Md. App. 161, 79 A.3d 976 (2013), *rev'd, Anne Arundel County, Maryland v. Steve Bell*, ___ Md. ___, ___ A.3d ___ (2015) (No. 29, September Term, 2014).

The County and several Defendants (collectively, the "Petitioners") petitioned for a writ of certiorari, asking the Court of Appeals to consider a number of questions, including whether the doctrine of property owner standing should be extended to cases in which private citizens challenged the validity of legislatively enacted comprehensive zoning. In their briefs to the Court of Appeals, the Protestants argued that they maintained property owner standing, while some of the Petitioners argued that they did not. One of the Petitioners reiterated its arguments in a footnote that Ms. Harrison did not enjoy taxpayer standing.

Held: Reversed, with directions to affirm the judgment of the Circuit Court.

In *Anne Arundel County, Maryland v. Steve Bell*, ___ Md. ___, ___ A.3d ___ (2015) (No. 29, September Term, 2014), filed immediately prior to the opinion in the present case, the Court of Appeals concluded that the doctrine of property owner standing is not the appropriate test for a judicial challenge to a comprehensive zoning action. Rather, plaintiffs wishing to challenge in Maryland courts the legislative process and final action adopting a comprehensive zoning are required to demonstrate taxpayer standing—the standing doctrine applicable to judicial challenges to legislative actions. Accordingly, *Bell* answered the first two questions presented to the Court in this appeal.

The Court of Appeals proceeded to determine whether the Protestants in this matter alleged sufficiently a basis for their standing to challenge the adoption by the County Council for Anne Arundel County in 2011 of a comprehensive zoning ordinance for a large, different portion of Anne Arundel County than was involved in *Bell.*

The Court concluded that Respondents did not satisfy the requirements of the taxpayer standing doctrine based on the record generated below, and they waived any arguments they may have had to that effect. For the sake of argument, the Court of Appeals was willing to assume that Ms. Harrison—the only Respondent to make any arguable effort at demonstrating taxpayer standing—was a taxpayer and that her allegations of "impermissible" spot zoning satisfy the requirement of alleging a governmental action that is illegal or *ultra vires*. Although Ms. Harrison alleged that her taxes would be increased, satisfying the requirement that she allege pecuniary loss, she waved any arguments in favor of taxpayer standing. At no point before the Court of Special Appeals or before the Court of Appeals did any Respondent assert that he, she, or it enjoyed taxpayer standing or satisfied the requirements thereof. Pursuant to Maryland

Rules 8-131(b) and 8-504(a)(6), because their arguments in favor of taxpayer standing were not presented in a brief nor presented with particularity, the Court did not consider them on appeal. Because Respondents waived the taxpayer standing argument, the Court did not consider whether Ms. Harrison alleged sufficiently that Respondents' suit was brought on behalf of all other taxpayers situated similarly, or if she alleged sufficiently a nexus between the challenged illegal or ultra *vires act* and pecuniary loss suffered by her.

COURT OF SPECIAL APPEALS

Israel Swarey, et ux., v. Kerry Stephenson, et al., No. 1272, September Term 2013, filed April 1, 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/1272s13.pdf

REMOVAL OF CASES – JURISDICTION AND PROCEEDINGS IN STATE COURT ON REMAND – GENERALLY

REMOVAL OF CASES – JURISDICTION AND PROCEEDINGS IN STATE COURT ON REMAND – WAIVER OF DEFENSES – PERSONAL JURISDICTION

REMOVAL OF CASES – JURISDICTION AND PROCEEDINGS IN STATE COURT ON REMAND – WAIVER OF DEFENSES – INSUFFICIENT SERVICE OF PROCESS

DUE PROCESS – REMOVAL OF CASES – JURISDICTION AND PROCEEDINGS IN STATE COURT ON REMAND – SERVICE

REMOVAL OF CASES – JURISDICTION AND PROCEEDINGS IN STATE COURT ON REMAND – SERVICE – PLEADINGS

PRETRIAL PROCEDURE – MOTION TO DISMISS – PERSONAL JURISDICTION – DISCOVERY

Facts:

Israel and Linda Swarey ("the Swareys" or "Appellants") fell prey to purportedly false asseverations about investment opportunities in undercapitalized shell companies owned and operated by Todd B. Parriott, Phillip Parriott, and Kerry Stephenson ("Appellees"). The Swareys allege that in searching for secure sources of retirement income in 2008, they were induced by Appellees to invest substantial sums in real estate projects that never developed and companies that were either bankrupt, without assets, or had ceased to exist. Ultimately, the Swareys lost $3.7 million, including their home—a house that Mr. Swarey, once a builder by trade, had built himself.

On May 18, 2011, the Swareys filed a 21-count complaint in the Circuit Court for St. Mary's County, Maryland, alleging, *inter alia*, fraud, embezzlement, elder abuse, conspiracy to commit fraud, violations of the Consumer Protection Act, and violation of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 to 1968. Appellees Todd and Phillip Parriott removed the case to federal court on December 15, 2011. Upon removal, Appellee Stephenson was served with a federal summons and a copy of the Swareys' complaint. In response, he filed an answer and request for jury trial in the federal court on February 1, 2012. In his answer, Stephenson raised as an affirmative defense that he had no dealings as an individual with the Swareys and, therefore, could not be sued in his personal capacity. Appellees Todd and Phillip Parriott filed separate motions to dismiss based on lack of personal jurisdiction, improper venue, and failure to state a claim upon which relief can be granted.

In its September 20, 2012, Memorandum Opinion, the federal district court determined that the Swareys failed to state a RICO claim, because according to the complaint, the defendants' "purported actions were narrowly directed toward a single fraudulent goal: to swindle the Swareys out of their life savings." "The alleged scheme involved a single set of victims (the Swareys), and caused a single discrete injury (the Swareys' monetary loss)[.]" Accordingly, the September 20, 2012, order of the district court dismissed the RICO count as to all defendants. With the only federal count dismissed, the district court declined to exercise supplemental subject matter jurisdiction over the remaining state law claims and remanded the case to the circuit court.

On remand, the circuit court addressed each of the Appellees' motions to dismiss. In his December 12, 2012, motion to dismiss, Stephenson argued that (1) he was not properly served with state court process; (2) he had never filed an answer in a Maryland court; and (3) because the Supreme Court has left it to the states to decide what effect to give federal pleadings on remand, and the Maryland courts had yet to address the issue specifically, the circuit court should decline to exercise jurisdiction predicated on the federal service. On April 5, 2013, the Swareys requested—as part of their oppositions to Appellees' motions to dismiss—that the court allow additional discovery regarding the Appellees' contacts with Maryland. However, on July 31, 2013, without allowing the requested discovery, the Circuit Court for St. Mary's County granted: (1) Appellee Todd Parriott's Motion to Dismiss for Lack of Personal Jurisdiction; (2) Appellee Phillip Parriott's Motion to Dismiss for Lack of Personal Jurisdiction; and (3) Appellee Kerry Stephenson's Motion to Dismiss for Lack of Personal Jurisdiction and Insufficiency of Service of Process.

Held: Reversed.

The Court of Special Appeals first observed that the federal removal framework in 28 U.S.C. § 1447 *et seq*. contemplates that a case will continue to progress in the district court, and in the event of remand, will continue to proceed efficiently in state court. However, the Supreme Court

has left it to the states to decide the precise use and effect of pleadings and papers filed in the federal court. *Ayres v. Wiswall*, 112 U.S. 187, 189-91 (1884).

Upon removal to federal court, Appellee Stephenson filed an answer raising lack of personal jurisdiction under Federal Rule 12(b). When the case was remanded to state court, Stephenson filed the underlying motion to dismiss pursuant to Maryland Rule 2-322(a). "A party who properly avails himself of [Federal Rule 12(b) as a] procedural device while his case is pending in federal court should not be penalized upon remand to the state court because of procedural pleading differences between state and federal courts." *de Reyes v. Marine Mgmt. & Consulting*, Ltd., 544 So. 2d 1259, 1260 (La. Ct. App.), *writ denied sub nom. deReyes v. Marine Mgmt. & Consulting, Ltd.*, 548 So. 2d 1249 (La. 1989). Thus, the Court concluded that Stephenson did not waive the defense of lack of personal jurisdiction because he raised it as an affirmative defense in the answer that he filed in federal court. However, because Stephenson answered the complaint in federal court, including all state law claims, and the federal court could have addressed those claims had it exercised supplemental jurisdiction, Stephenson is deemed to have waived the defense of insufficient service of process by not raising it either prior to or in his answer to the complaint.

Addressing the efficacy of service of process in the federal court upon remand to the state circuit court, the Court of Special Appeals noted that service under the federal rules, of the federal court summons and a copy of the same complaint that was filed in state court prior to removal, satisfies the requirements of due process. Further, the Court found nothing to suggest that Stephenson would be deprived of his right to notice and an opportunity to be heard if service under the federal rules is deemed sufficient to bring him before the state court. The Court also observed that requiring re-service upon remand to the state court, in this case, would unnecessarily favor procedural form over substance, where there is no readily discernable prejudice to the Appellee.

The Court of Special Appeals held, as a matter of first impression, that service with the federal court process, under these particular circumstances, was sufficient to bring Stephenson properly before the state court on remand. The nature of the action and the circumstances of the case before the Court; namely, a single case containing state and federal claims that was removed and remanded from state to federal court and back, entreated the Court to presume that all service of process and all pleadings filed in the case should be recognized as valid, regardless of whether the pleadings were filed or the process was served in state or federal court.

Finally, turning to all three Appellees' motions to dismiss for lack of personal jurisdiction, the Court of Special Appeals emphasized the circuit court's failure to allow discovery on that issue. Where the Appellants seek discovery "specifically aimed at the contact which the defendant has with this State," and the "[d]etermination of quality and quantity of those contacts [is] essential to the court's proper conclusion as to whether defendant [is] subject to the long arm jurisdiction of the court," preventing them from discovering those facts is an abuse of discretion. *Androutsos v. Fairfax Hospital*, 323 Md. 634, 639-40 (1991) (citing *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978)). Accordingly, the Court of Special Appeals vacated the July 31, 2013 orders of the Circuit Court for St. Mary's County and remanded with instructions

that the parties be allowed to conduct discovery on the specific issue of the full extent of Appellees' connections to Maryland, and for further proceedings.

Daniel J. Margolis v. Sandy Spring Bank, No. 2215, September Term 2013, filed February 26, 2015. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2015/2215s13.pdf

COMMERCIAL LAW–MD 4-303(b)–UCC INTERPRETATION

CONSUMER PROTECTION–MARYLAND CONSUMER PROTECTION ACT–UNFAIR OR DECEPTIVE TRADE PRACTICE

Facts:

Petitioner Daniel J. Margolis, the representative of a putative class, brought a Consumer Protection Act (CPA) challenge to Sandy Spring Bank's practice of batch-processing debit-card transactions and ATM transactions. Margolis maintained a checking account with Sandy Spring Bank, which had overdraft protection. For every overdraft, the Bank charged a fee of $37.00. Margolis claimed that he incurred overdraft fees because the bank reordered ATM and debit-card transactions in his account, debiting the largest transactions first. Margolis's complaint alleged that the bank reorders transactions at the end of each business day, deducting the largest debits or withdrawals first and continuing thereafter from largest to smallest in descending order to increase overdraft fees.

In his complaint, Margolis alleged that the bank violated the CPA because its Deposit Account Agreement did not disclose, or did not adequately disclose, the practice of batch-processing transactions by reordering them from largest to smallest. He also alleged that the bank did not adequately inform its customers of their ability to opt out of overdraft-protection services, under which the bank pays a transaction despite an overdraft, but charges an overdraft fee. Sandy Spring Bank filed a motion to dismiss. Following a hearing, the Circuit Court for Montgomery County dismissed his complaint for failure to state a claim upon which relief can be granted.

Held: Affirmed

The Court of Special Appeals addressed Margolis's argument that the circuit court had mistakenly relied on MD CL section 4-303(b) to find that the General Assembly has authorized batch-processing of electronic debits. The Court of Special Appeals noted that MD CL section 4-303(b) is a word-for-word adoption of section 4-303(b) of the Uniform Commercial Code (UCC). Looking to other courts' interpretation of UCC 4-303(b), the Court of Special Appeals held that MD CL section 4-303(b) does not apply to electronic debit and ATM transactions.

Despite taking issue with the circuit court's misplaced reliance on MD CL section 4-303(b), the Court of Special Appeals rejected Margolis's Consumer Protection Act Claims. After closely examining the Bank's disclosures, the Court held that Margolis did not sufficiently allege that

the Bank engaged in an unfair or deceptive trade practice. The Court of Special Appeals discusses Margolis's claims that the Bank violated the CPA by committing certain, specific actions, including: reordering transactions from high to low, charging fees on accounts with positive balances, reordering multiple days' worth of transactions, preventing customers from ascertaining balances, charging excessive overdraft fees, failure to disclose ability to opt out, processing debits before credits. The Court of Special Appeals also held that the implied contractual duty of good faith and fair dealing has no bearing on Margolis's CPA claims.

Thomas H. Quispe Del Pino v. Maryland Department of Public Safety and Correctional Services, et al., No. 258, September Term 2012, filed April 1, 2015. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2015/0258s12.pdf

CONSTITUTIONAL LAW – MARYLAND SEX OFFENDER REGISTRATION ACT ("MSORA") – RETROACTIVE APPLICATION OF MSORA THAT RESULTS IN AN INCREASE IN THE REGISTRATION PERIOD FROM TEN YEARS TO TWENTY-FIVE YEARS VIOLATES THE PROHIBITION AGAINST *EX POST FACTO* LAWS UNDER ARTICLE 17 OF THE MARYLAND DECLARATION OF RIGHTS

Facts:

In 2001, appellant pled guilty in the Court of Common Pleas in Pennsylvania to, among other things, one count of unlawful communication with a minor and one count of corruption of minors. These offenses were committed in 2000. The court sentenced appellant to ten years' probation, and because appellant was a Maryland resident, his probation was transferred to Maryland. As a condition of probation, appellant was required to register as a sex offender in Maryland for the duration of the ten-year period, ending on April 9, 2011.

However, as a result of the retroactive application of the Maryland sex offender registration act ("MSORA") by the 2010 amendment thereto, appellant was reclassified as a Tier II sex offender and was required to register for twenty-five years, instead of ten years. In December of 2011, appellant brought an action against the Maryland Department of Public Safety and Correctional Services and Gary Maynard, its Secretary (collectively, the "Department"), claiming that his continued registration beyond ten years would violate the prohibition against *ex post facto* laws under both the United States Constitution and the Maryland Declaration of Rights. The Department disagreed, and the trial court entered summary judgment in favor of the Department.

Held: Reversed.

On appeal, the Court of Special Appeals reversed. Because appellant was properly on the Maryland sex offender registry on September 30, 2010, he was subject to the retroactive application of the 2010 amendment to MSORA. Appellant argued, as he did in the trial court, that such retroactive application violated Article 17 of the Maryland Declaration of Rights by increasing the term of his registration from ten years to twenty-five years. The Court agreed.

The Court relied on the Court of Appeals' decision in *Doe v. Department of Public Safety & Correctional Services*, 430 Md. 535 (2013) ("*Doe I*") and stated that the facts critical to the holding in *Doe I* were substantially the same as the case *sub judice*. Specifically, central to *Doe I*

were the following facts: (1) in 1983-1984, when Doe committed the sexual offense for which he was later convicted, Doe was not subject to MSORA – indeed, MSORA did not exist at that time; and (2) because of his conviction, the retroactive provision of MSORA placed Doe on the sex offender registry for life. In other words, but for the retroactive application of MSORA under the 2009 and 2010 amendments thereto, Doe would not be subject to registration as a Tier III sex offender for the rest of his life.

Similarly, in the instant case, (1) in 2000, when appellant committed the sexual offense for which he was later convicted, appellant was not subject to MSORA *beyond a period of ten years*; and (2) because of his conviction, the retroactive provision of MSORA placed appellant on the sex offender registry *for an additional period of fifteen years*. In other words, but for the retroactive application of MSORA, appellant would not be subject to registration as a Tier II sex offender for the fifteen year period following the initial ten years of registration. In sum, at the end of the first ten years as a registered sex offender, appellant was in the exact same position as Doe – the retroactive application of MSORA placed both Doe and appellant on the sex offender registry when they otherwise would have been free from any obligation under MSORA.

The Department, nevertheless, argued that *Doe I* was distinguishable, because (1) Doe's 1983-84 crime pre-dated MSORA, while MSORA was in effect when appellant committed his crime in 2000; and (2) Doe had never been legally obligated to register as a sex offender prior to the 2009/2010 amendments, while appellant was actually on the sex offender registry when the 2009/2010 amendments became effective. The Court rejected the Department's argument, stating that the retroactive imposition of MSORA when it would not otherwise be required for a convicted sex offender was found to be punishment in *Doe I*, and neither the existence of the registry, nor appellant's presence thereon, would lessen the severity of such punishment.

George E. Pickett, III v. State of Maryland, No. 199, September Term 2014, filed April 3, 2015. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2015/0199s14.pdf

ABUSE OF DISCRETION – CHANGE IN DEFENDANT'S APPEARANCE – IDENTITY AND CONSCIOUSNESS OF GUILT – PLAIN ERROR.

Facts:

George Pickett, III, was convicted of the robbery and assault of 16-year-old Samer El-Amine. When Mr. El-Amine stopped at a 7-Eleven convenience store at 1:30 a.m. on the way home from his friend's house, he noticed a light brown car with two people inside. Although Mr. El-Amine could not "really see" the faces of the two individuals in the car, he did notice that the individual in the front passenger seat had a "high-top fade" haircut.

Twenty to thirty seconds after Mr. El-Amine left the 7-Eleven store, "the same car . . . or I think it was the same car – it looked like it," pulled up next to him and "the person in the passenger side got out." He described the car as "the same color and the same shape." The two individuals in the car were wearing ski masks, so Mr. El-Amine could not see their faces or their hair. The person who got out of the car put a small, black gun to Mr. El-Amine's head and said: "Give me your shit." The person then reached into Mr. El-Amine's pocket and removed his iPhone5, which was covered by a blue "OtterBox" phone case. The person also told him: "Give me this Helly, too," referring to Mr. El-Amine's red and white Helly Hansen brand jacket. Mr. El-Amine hesitated, at which point he was forced to the ground. The person removed his jacket, got back into the car, and the driver of the car drove away "very fast."

Mr. El-Amine walked to his mother's house, approximately two minutes away. He told his mother what had happened, and she called the police. In the 911 call, Mr. El-Amine described the person who got out of the car as "wearing a colorful jacket. He was kind of dark-skinned or brown-skinned, probably brown-skinned, and he had a long . . . high-top fade."

When the police arrived at his mother's house that night, Mr. El-Amine gave a description of the passenger and drew a picture of the haircut that he saw on the passenger of the car when he walked out of the 7-Eleven. A few days later, Mr. El-Amine went to the police station to look at photographs of potential suspects. He identified a photograph of an individual that he thought "was him, but [he] wasn't sure." He explained that he chose the photograph based on the skin tone of the individual depicted, noting that, during the robbery, he was able to see the individual's "eyes and the skin around his eyes and part of the nose."

Mr. El-Amine also identified the OtterBox and the jacket that had been stolen from him. His iPhone5 was not recovered.

Detective Adam Hart, a member of the Montgomery County Police Department, identified a photograph of appellant taken that day, at the time of appellant's arrest. The photograph was admitted into evidence, and it depicted appellant with a high-top fade haircut.

At the close of the evidence, the court and counsel discussed jury instructions. The court declined to give an instruction on consciousness of guilt, despite the State's argument that appellant's change in hairstyle between the time of the crime and the time of trial could be construed as such. The court stated that "cutting your hair, alone" was not enough to warrant that instruction. It stated, however, that the State could address that issue in closing, stating: "I think that the Defense is certainly free to argue that he cut his hair. From February – it's now December. I think both of you have that argument."

During closing arguments, defense counsel challenged appellant's identity as the assailant and noted that Mr. El-Amine was not even asked if he could identify appellant in court. The State noted appellant's changed appearance, stating: "He's drastically changed his appearance ladies and gentleman, drastically."

Appellant argued on appeal that the State's references in closing arguments to his changed hairstyle between the time of assault and the time of trial were improper, and that the court's instruction to the jury regarding eyewitness identification was improper because Mr. El-Amine's eyewitness identification was "uncertain" and "dubious."

Held: Affirmed.

It is not an abuse of discretion for a trial court to allow a prosecutor to comment on a significant change in the physical appearance of the defendant between the time of the crime and the trial where the change relates to identity and consciousness of guilt. Here, identity was the primary issue, and the trial court did not abuse its discretion in permitting the prosecutor to argue that appellant's change in hairstyle was made to avoid identification.

Plain error review is a "rare, rare phenomenon," undertaken only when unobjected to error is extraordinary. Appellant has not convinced us to exercise our discretion to engage in plain error review in this case, where the court gave a pattern instruction, to which appellant's counsel agreed and referenced in her closing argument. This is not one of those rare cases that warrants plain error review.

Brittany Norwood v. State of Maryland, No. 2718, September Term, 2011. Opinion filed on April 29, 2015, by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2015/2718s11.pdf

CRIMINAL LAW – MIRANDA – CUSTODIAL INTERROGATION – EXPERT TESTIMONY – LAY OPINION TESTIMONY

Facts:

On the morning of March 12, 2011, appellant Brittany Norwood ("Norwood") and her co-worker, Jayna Murray ("Murray") were discovered in the Lululemon Athletica retail store in Bethesda, Maryland, the apparent victims of a violent attack. Murray was found deceased, having suffered approximately 331 individual injuries. Norwood was found bound with zip-ties with multiple lacerations on her body.

Although Norwood was initially viewed as a victim, in time, police came to view her as a suspect. It was determined that Norwood had attacked Murray with multiple weapons, ultimately causing her death. Thereafter, Norwood doctored the scene in order to make it appear that a robbery had occurred and that both she and Murray had been victims of an attack. Norwood inflicted superficial injuries upon herself, bound herself with zip-ties, and waited to be discovered the following morning. A Lululemon Athletica manager discovered Norwood and Murray on March 12, 2011, and a police investigation began.

During the week following the incident, police discovered various problems with Norwood's story. Police engaged in multiple conversations with Norwood. Norwood's statements to police officers during certain conversations were later the subject of a motion to suppress.

Norwood was placed under arrest on March 18, 2011. Following Norwood's eight-day trial in late October and early November of 2011, the charges submitted to the jury were first-degree premeditated murder and second-degree specific intent to kill murder. The jury found Norwood guilty of first-degree murder. On January 27, 2012, the trial court sentenced Norwood to life imprisonment without the possibility of parole.

This appeal followed.

Held: Affirmed.

The Court of Special Appeals held that the circuit court did not err by denying Norwood's motion to suppress statements made during the March 16, 2011 interview and during a portion of the March 18, 2011 interview on the basis of *Miranda*. With respect to the March 16 interview, the Court held that Norwood was not in custody when she came to police headquarters

voluntarily with her siblings. The Court noted that Norwood spoke casually, calmly, and amiably and did not appear to be intimidated. The Court further observed that doors to the police interview room were left open at various times throughout the interview and that Norwood was shown to an employee restroom, which was on a hallway that had exterior doors, through which Norwood could have exited the building. The Court emphasized that the test for *Miranda* is objective and that, although a detective had subjectively begun to view Norwood as a suspect prior to the March 16 interview, the detective did not convey his suspicions to Norwood.

The Court of Special Appeals further held that Norwood was not in custody during the relevant portions of the March 18 interview. The Court noted that the interview was arranged at Norwood's request after Norwood realized that there was information she had omitted during the previous interview. Norwood arrived at police headquarters accompanied by her siblings and initiated the conversation, saying, "All right, I'm here because . . . ." The Court noted that Norwood appeared to believe that she was in control of the situation throughout the relevant portion of the interview. Based on the totality of the circumstances, the Court held that the trial court did not err by denying Norwood's motion to suppress.

The Court of Special Appeals further rejected Norwood's contention that a police officer's testimony about a cut he observed on Norwood's hand constituted inappropriate opinion testimony. The Court first observed that the police officer did not offer any opinion, lay or expert, because his testimony regarding the cause of Norwood's injury was stricken by the trial court. Rather, the officer testified about injuries he had observed in the past and described the injury he observed on Norwood's hand. The Court further held that, assuming *arguendo* that the testimony was improper, any error was harmless beyond a reasonable doubt because there was overwhelming evidence that Murray's murder was premeditated.

Shawn Stevenson v. State of Maryland, No. 2018, September Term 2013, filed April 2, 2015. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2015/2018s13.pdf

CRIMINAL PROCEDURE – FRYE-REED HEARING – CELLULAR TOWER EVIDENCE

CRIMINAL PROCEDURE – EXPERT WITNESS – CALL DETAIL ANALYSIS

CRIMINAL PROCEDURE – EXPERT WITNESS – DIGITAL FORENSICS

APPELLATE REVIEW – PRESERVATION OF ISSUES – HEARSAY OBJECTION

CRIMINAL PROCEDURE – UNFAIRLY PREJUDICIAL EVIDENCE – ADMISSION OF PHOTOGRAPHS

CRIMINAL PROCEDURE – UNFAIRLY PREJUDICIAL EVIDENCE – REFUSAL TO GIVE DNA SAMPLE

CRIMINAL PROCEDURE – PRIOR BAD ACTS – PHYSICAL ABUSE BETWEEN DEFENDANT AND VICTIM

CRIMINAL LAW – SUFFICIENCY OF THE EVIDENCE – CIRCUMSTANIAL EVIDENCE

Facts:

On April 23, 2012, Noi Sipayboun was found dead by her sister at a home she shared with Shawn Stevenson. She had sustained three stab wounds and thirteen cutting wounds, suggesting that she had been murdered. The police quickly began to suspect that Mr. Stevenson was responsible for Ms. Sipayboun's death. Ms. Sipayboun, who had been romantically involved with Mr. Stevenson for thirteen years, was, at the time of her death, in the process of moving out of the home she shared with Mr. Stevenson after he learned that she had engaged in an intimate relationship with another man. Mr. Stevenson was angered by Ms. Sipayboun's decision to move out and, during the week before she was killed, had multiple violent altercations with her. Moreover, cellular tower "ping" evidence established that Mr. Stevenson was in close proximity to the scene of the crime during the time Ms. Sipayboun was killed.

On June 28, 2012, Mr. Stevenson was charged in the Circuit Court for Baltimore City with Ms. Sipayboun's murder and a number of other offenses. At trial, Baltimore City Police Detective John Jendrek was qualified as an expert in the fields of cell phone "certification, detail analysis, mapping and location." He testified that he had reviewed the "call detail records" for cell phones belonging to Mr. Stevenson and Ms. Sipayboun and determined that Mr. Stevenson's cell phone was in the area where Ms. Sipayboun's body was found during the time she was killed. Before trial, Mr. Stevenson made a motion *in limine* to exclude Detective Jendrek's testimony because,

in his view, cellular tower "ping" evidence was not generally accepted in the scientific community. Mr. Stevenson argued that the circuit court was required to conduct a *Frye-Reed* hearing to determine whether the technique Detective Jendrek employed to determine the location of his cell phone was generally accepted in the scientific community. The circuit court declined to conduct a *Frye-Reed* hearing because Mr. Stevenson was not offering an expert who could dispute the acceptance of Detective Jendrek's technique. Detective Jendrek's testimony was admitted at trial over objection.

At the conclusion of an eight-day jury trial, Mr. Stevenson was convicted of first-degree murder, first-degree sexual offense, and two deadly-weapon counts. Mr. Stevenson appealed, arguing, *inter alia*, that the circuit court erred by not conducting a *Frye-Reed* hearing before admitting cellular tower "ping" evidence against him.

Held: Affirmed.

Mr. Stevenson's contention that the circuit court erred by not conducting a *Frye-Reed* hearing before admitting cellular tower "ping" evidence turned on whether such evidence was novel scientific evidence. Because Mr. Stevenson offered no evidence or argument in the circuit court to support his claim that the technique employed by Detective Jendrek was "novel" or not generally accepted, the Court of Special Appeals held that the circuit court did not abuse its discretion in declining to conduct a *Frye-Reed* hearing. The Court noted that although a witness using telephone call detail data to locate someone must be qualified as an expert, *see State v. Payne & Bond*, 440 Md. 680 (2014), there was not any dispute about the general acceptance of the underlying techniques.

Devin Paige v. State of Maryland, No. 2254, September Term 2013, filed April 2, 2015. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2015/2254s13.pdf

CRIMINAL LAW – JURY INSTRUCTIONS – MERGER – CLOSING ARGUMENT

Facts:

Following a jury trial, Devin Paige, appellant, was convicted of first-degree rape, third-degree sexual offense, second-degree assault, and third-degree burglary. At trial, following the jury instructions, the trial court turned the case over to the jury for its deliberations. In the course of informing the jurors regarding the administrative processes and procedures in place during their deliberations, the court instructed the jury that if the jury wished to stop its deliberations for the evening and return in the morning, the jury could give the court a note indicating "what time you would like us to convict -- to resume your deliberations in the morning." After the court concluded its comments, defense counsel requested a bench conference and informed the court of the misstatement made during the court's comments, indicating that both he and his client had heard the court instruct the jurors to inform the court when they were ready to "convict."

The court immediately provided a curative instruction, explaining that the court had been informed that it used the word "convict" but that the court had believed it had said "reconvene." The court defined the word "reconvene" and emphasized to the jury that "you are the determiners of the facts and the evidence." The court emphasized, "The word is reconvene, reconvene. Not convict, but reconvene." Defense counsel made no further objection.

During the trial, appellant's attorney cross-examined two witnesses regarding the presence of a maxi-pad at the crime scene. No maxi-pad was introduced into evidence at trial. During closing argument, defense counsel argued that the jury should question the State's case because of the way the investigation was conducted and because of the State's failure to account for certain items of evidence. Specifically, defense counsel repeatedly pointed out that the State could not account for a specific piece of evidence, a maxi-pad. In rebuttal, the prosecutor responded, "Where's the maxi-pad? Detective Elkner told you it's at the evidence crime unit and they could not get a fingerprint off of it." Defense counsel objected and the court overruled the objection.

The jury convicted appellant on charges of first-degree rape, third-degree sexual offense, second-degree assault, and third-degree burglary, and acquitted him on charges of first and second-degree sexual offense, first-degree assault, first-degree burglary, and handgun offenses.

The trial court sentenced appellant to life imprisonment with all but fifty years suspended for first-degree rape. The court imposed a concurrent sentence of ten years' imprisonment for second-degree assault, a concurrent sentence of ten years' imprisonment for third-degree sexual offense, and a concurrent sentence of five years' imprisonment for third-degree burglary.

Following the trial, defense counsel filed a motion for a new trial on the basis of the trial court's "slip of the tongue" error and subsequent curative instruction. Defense counsel argued that the judge's use of the word "convict" in place of the word "reconvene" may have biased the jury against appellant, thereby depriving him of his constitutional right to trial by a fair and impartial jury. Following a hearing, the trial court denied appellant's motion for a new trial.

This appeal followed.

Held: Affirmed in part and reversed in part.

The Court of Special Appeals held that the trial court did not err by denying appellant's motion on the basis of an allegedly improper and inadequate curative instruction, which was propounded after the trial court mistakenly used the word "convict" rather than "convene" or "reconvene." The trial court's isolated slip of the tongue, which was immediately explained and corrected, was not a flagrant or extraordinary error, and the trial court emphasized that it was the jury's duty to carefully consider the evidence and determine whether appellant was guilty of the charged offenses.

The Court of Special Appeals observed that the State had conceded that the trial court erred by imposing separate sentences for appellant's convictions for second-degree assault and first-degree rape, because those offenses merge for sentencing purposes. The Court held that second-degree assault merges with first-degree rape for sentencing purposes because the facts necessary to prove rape also prove second-degree assault. The sexual penetration of appellant's penis into the victim's vagina, by threat of force and without her consent, constituted an offensive touching, i.e., an assault, and also a rape.

The Court of Special Appeals considered whether rape and third-degree sexual offense merge for sentencing purposes, holding that rape and third-degree sexual offense do not merge for sentencing purposes because each offense has an element the other offense does not. In order to prove rape, the State must prove that a defendant engaged in vaginal intercourse with the victim. In order to prove third-degree sexual offense, the State must prove that a defendant engaged in sexual contact with the victim, which is defined as the intentional touching of the victim's genitals or other intimate body parts with a part of the body other than the penis, mouth, or tongue.

Finally, the Court of Appeals addressed the issue raised by appellant with respect to the prosecutor's closing argument. The Court of Special Appeals held that the trial court did not abuse its discretion in its regulation of the prosecutor's closing argument when it permitted the prosecutor to comment about the whereabouts and evidentiary value of a maxi-pad.

Kwaku Wiredu v. State of Maryland, No. 2291, September Term 2013, filed April 2, 2015. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2015/2291s13.pdf

CRIMINAL PROCEDURE – RULE OF LENITY – DRIVING WHILE IMPAIRED BY ALCOHOL

APPELLATE REVIEW – PRESERVATION OF OBJECTION – JURY INSTRUCTION

CRIMINAL PROCEDURE – RESTITUTION TO SOMEONE OTHER THAN THE VICTIM

Facts:

On June 29, 2012, Kwaku Wiredu, a private duty nurse and a certified medical technician, was driving home late at night while impaired by alcohol. Mr. Wiredu was driving in the left southbound lane of Harford Road, the lane closest to the center line, when he observed a motorist operating a motorcycle in the left northbound lane. Mr. Wiredu's silver truck "merged" into the motorcycle's lane and collided head-on with the motorcycle, which was being driven by Mr. James Poleto. As a result of the accident, Mr. Poleto landed near the curb on his back, approximately thirty feet from his motorcycle. Mr. Wiredu then exited his vehicle and "pulled out his privates" to urinate on Harford Road. An officer responded to the scene and gave Mr. Wiredu an opportunity to take a field sobriety test. When Mr. Wiredu declined, he was arrested for driving under the influence of alcohol.

Mr. Wiredu was later charged and convicted in the Circuit Court for Baltimore City of second-degree assault, causing a life-threatening injury by motor vehicle while impaired by alcohol, indecent exposure, and public urination. The circuit court, on December 2, 2013, sentenced Mr. Wiredu to ten years, all but two years suspended, for second-degree assault and to a consecutive two years for causing a life threatening injury by motor vehicle while impaired by alcohol. In addition, the circuit court ordered Mr. Wiredu to pay $155,672 in restitution, including $60,000 in lost wages for Ms. Poleto, who gave up her job to provide care for her husband. Mr. Wiredu appealed, arguing that (1) his second-degree assault conviction should have merged with his causing a life-threatening injury by motor vehicle while impaired by alcohol conviction for sentencing purposes under the rule of lenity; (2) the circuit court's instruction to the jury with respect to second-degree assault was deficient; and (3) the circuit court erred in ordering him to pay restitution for *Ms. Poleto's* lost wages because the circuit court was only permitted to order restitution for *Mr. Poleto's* lost wages.

Held: Affirmed in part, vacated in part, and remanded for further proceedings.

With respect to Mr. Wiredu's assertion that the circuit court erred by sentencing him separately for second-degree assault and for causing a life-threatening injury by motor vehicle while impaired by alcohol, the central issue was whether the two convictions arose out of the same criminal behavior. The State argued that separate crimes occurred, that Mr. Wiredu committed second-degree assault "when he crossed the center line and struck Mr. Poleto's motorcycle in a head-on collision" and his driving while impaired offense "subsumed his entire night: [Mr.] Wiredu drinking earlier that evening; [Mr.] Wiredu deciding to drive; [Mr.] Wiredu negligently causing the accident; [Mr.] Wiredu demonstrating he was under the influence." The Court of Special Appeals disagreed, finding that the two offenses arose out of the same conduct, *i.e.*, Mr. Wiredu's decision to drive while impaired by alcohol and negligently causing a car accident that injured Mr. Poleto. The Court then analyzed whether the Legislature expressed an intention as to whether separate punishments should be imposed for these crimes. Because it found nothing to indicate whether the Legislature intended to authorize multiple punishments for the two offenses, the Court held that the crimes merge under the rule of lenity for sentencing purposes.

As to Mr. Wiredu's claim that the circuit court improperly instructed the jury on second-degree assault, the Court found that Mr. Wiredu's contention was unpreserved because he failed to lodge an objection to the circuit court's instruction at trial. The Court declined to exercise its discretion to consider Mr. Wiredu's unpreserved contention under the plain error doctrine, in part because the instruction at issue came directly from the Maryland Pattern Jury Instructions, MPJI-CR § 4:01(C), a fact that weighed heavily against the possibility of plain error review.

Mr. Wiredu's final challenge on appeal was that the circuit court erred in ordering him to pay restitution for Ms. Poleto's lost wages because it lacked the authority to do so under Md. Code (2001, 2008 Repl. Vol.), § 11-603 of the Criminal Procedure Article ("CP"). Finding that CP § 11-603 does not authorize a circuit court to award restitution for the lost earnings of individuals other than the victim, the Court held that the circuit court abused its discretion in awarding restitution of Ms. Poleto's lost wages. Accordingly, the Court vacated the portion of the circuit court's restitution order requiring Mr. Wiredu to pay $60,000 for Ms. Poleto's lost wages.

Montgomery County, Maryland, et al. v. Fraternal Order of Police, et al., No. 175, September Term 2014, filed April 3, 2015. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2015/0175s14.pdf

REFERENDUM – BALLOT QUESTION ON EFFECTS BARGAINING – POWER OF COUNTY TO USE COUNTY FUNDS FOR POLITICAL CAMPAIGN ON NON-PARTISAN BALLOT ISSUE – GOVERNMENT SPEECH DOCTRINE – CAMPAIGN FINANCE PROVISIONS OF MARYLAND ELECTION LAW.

Facts:

The Montgomery County Council unanimously passed a bill eliminating the collective bargaining right of most county police officers to "effects bargaining," that is, to bargain over the effects of discretionary decisions made by police management. The FOP as the collective bargaining representative of the affected police officers, petitioned the bill to referendum, as Question B in the 2012 general election, and launched a campaign to defeat it. The County Executive and the Director of the County's Office of Public Information ("OPI") launched a County campaign for approval of Question B. The County funded its campaign using a portion of the money already budgeted to OPI. The thrust of the campaign was that effects bargaining was harmful to the County because it interfered with its ability to efficiently and effectively manage its police force. The County used signs, literature, ads on buses, mailings, and website material to promote its campaign in favor of Question B.

In the Circuit Court for Montgomery County, the FOP and two police officer members, the appellees, sued the County, the County Executive, and the OPI Director, the appellants, alleging that the County did not have the power to use public funds to carry out a political campaign on a ballot issue, that the individual defendants were a "political committee" within the meaning of the Maryland campaign finance election laws, that they had failed to comply with the requirements of those laws, and that the County and the individual defendants had violated state and local laws by having County employees work on the Question B campaign. The FOP sought declaratory and injunctive relief and damages.

In the general election, Question B was approved by a wide margin, which resulted in the bill eliminating effects bargaining going into effect. The FOP amended its complaint to elaborate on its claims but did not challenge the election results. The court held a trial and issued a declaratory judgment against the County and the individual defendants. It ruled that the County's use of OPI funds in what the court characterized as a partisan political campaign was *ultra vires* and illegal; that the government speech doctrine did not apply; that the County was not subject to the campaign finance provisions of the Election Law Article, and therefore the legislature must have intended that local governments never would involve themselves in political campaigns; that the individual defendants were a "political committee" under the campaign finance laws and had violated those laws; and that the County and the individual

defendants had violated state and local laws pertaining to political activity by employees during work hours. The court declined to award damages. The County and the individual defendants appealed and the FOP cross-appealed.

Held: Reversed.

Declaratory judgment against the County and the individual defendants reversed. Under the government speech doctrine, a government entity such as the County has a right to speak on non-partisan issues affecting governance, and may use public funds to promote government speech, even in the context of a political campaign on a ballot question. Effects bargaining was such an issue. It was not partisan, in that it was not tied to a candidate or slate of candidates or to any political party; and it concerned the County's ability to best manage its police force, which is a matter of governance. The County's use of public funds to advocate on Question B was not outside its powers as a charter county and did not violate any laws in the Election Law Article. A charter county has the traditional and inherent power to appropriate and spend money on governmental purposes, which would include advocating on a non-partisan ballot issue that affects the county's ability to govern. Also, because there is nothing in the campaign finance law provisions of the Election Law Article that expressly includes the County, the County is not subject to them. It is not a rational application of the rules of statutory construction to infer from the fact that the County is not subject to those campaign finance laws that it is prohibited from using public funds to conduct a political campaign advocating in favor of a non-partisan ballot issue that affects governance.

The individual defendants were at all times acting on behalf of the County in participating in the Question B campaign; therefore, as agents of the County, they were not subject to the campaign finance provisions of the Election Law Article either. They were not a "political committee," which is an entity created by those laws, and therefore they could not have been found to have failed to comply with the laws pertaining to political committees. Finally, the state and local laws about political activity of government employees while on the job are not implicated when an employee's work responsibility involves non-partisan advocacy in favor of government programs and policies, even in the context of a contested ballot issue.

Maryland Department of the Environment, et al. v. Anacostia Riverkeeper, et al., No. 2199, September Term 2013, filed April 2, 2015. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2015/2199s13.pdf

ENVIRONMENTAL LAW – STORMWATER MANAGEMENT – FEDERAL PERMIT REQUIREMENTS

ENVIRONMENTAL LAW – STORMWATER MANAGEMENT – STATE PERMITTING PROCESS

Facts:

Environmental groups, including Anacostia Riverkeeper, challenged the decision of the Maryland Department of the Environment (the "Department") to issue a permit governing regulation of stormwater in Montgomery County (the "County"). They claimed that the Permit failed to comply with federal permit requirements and that the Permit was approved in a way that also did not comply with rules governing Maryland's permitting process. Specifically, Anacostia argued that federal standards required this Permit, referred to as an MS4, to comply with certain water quality standards laid out in 33 U.S.C. § 1311. The circuit court agreed, holding that the Permit was subject to the requirements of § 1311 and also those of § 1342 (enacted later). It then held that the Permit fell short of these and state law requirements because it was unclear within the four corners of the Permit "what the permittees will do, how they are to do it, what standards apply, or how one will measure compliance or noncompliance." The circuit court specifically found fault with vague and unascertainable metrics in the Permit, and with respect to two important requirements of the Permit (described below). The Department appealed.

Held: Affirmed and remanded.

The Court of Special Appeals held as a threshold matter that the Clean Water Act does not require an MS4 to comply with the water quality standards articulated in 33 U.S.C. § 1311, but only those contained in § 1342. An MS4 permit does not fall under the original provisions of the Act, but instead is governed by 1987 amendments, including § 1342, that replaced those earlier standards. Accordingly, the Permit is not subject to the technology-based limitations of § 1311, but to § 1342's requirements—particularly that an MS4 permit reduce discharge of pollutants "to the maximum extent practicable"—and to other applicable state standards.

With respect to the challenge on grounds that the permitting process was flawed, however, the Court agreed with Anacostia. It held that the Permit failed to comply with the State permitting process in two separate regards. *First,* in the course of the Permit's drafting, the public did not have a meaningful opportunity to review its terms and comment on it. Too many of the Permit's

terms required substantive decisions about how it should work to be made in the future, so the public could not have determined during the period the Permit was issued whether those decisions were reasonable. The Permit also lacked specificity, and broadly incorporated by reference numerous (and in some case outdated) texts that gave no real idea of its terms. It lacked any meaningful deadlines or other ways for someone reviewing it to measure compliance. *Second,* the Department's decision to issue the Permit was unsupported by substantial evidence with respect to the Permit's two most important requirements: that the County "implement or install best management practices" on twenty percent of the impervious surfaces in the County, and that it set total maximum daily loads ("TMDLS") of pollutants. As to the twenty percent requirement, the Permit did not define the universe of impervious surfaces, and the best management practices referred to in the Permit were non-specific and unmeasurable. As to the TMDLs, the Permit did not lay out with any clarity how the County should attain TMDL requirements, and there were no enforceable minimum requirements that the County was required to meet.

Justin Davis v. Wicomico County Bureau of Support Enforcement, No. 2358, September Term 2013, filed April 2, 2015. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2015/2358s13.pdf

FAMILY LAW – PATERNITY PROCEEDINGS – AFFIDAVIT OF PARENTAGE – NO RIGHT TO BLOOD OR GENETIC TEST

Facts:

Under the Family Law Article ("FL"), paternity may be established either by a judicial "declaration of paternity" under FL §§ 5-1032, *et seq.*, or by an "affidavit of parentage" under FL § 5-1028, without court action. FL § 5-1038 provides that a declaration of paternity may be set aside *at any time* by means of a blood or genetic test. On the other hand, FL § 5-1028 permits a challenge to paternity established by an "affidavit of parentage" after 60 days only on the grounds of fraud, duress, or material mistake of fact.

At the time of the birth of twin boys to his girlfriend, appellant signed an affidavit of parentage for each boy. Several years later, appellant claimed that he was not the father of the twins and requested that the trial court order a blood or genetic test to prove his claim. The court denied his request, determining that by law appellant was the father of the children based on the signed affidavits of parentage, and ordered appellant to pay child support. Appellant did not appeal this order.

Two years later, appellant filed a complaint again asking the circuit court to order a blood test, to strike the finding of paternity by affidavit of parentage, and to set aside the child support order. The court again denied his request, concluding that, under the unambiguous language of the statute, the right to a blood test applied only to set aside a judicial declaration of paternity under FL § 5-1038, and not to paternity established by affidavit of parentage under FL § 5-1028. The circuit court also held that, regardless of the language of the statute, appellant waived his right to a blood test when he failed to appeal the original determination by the trial court.

Held: Affirmed.

The Court of Special Appeals held that under the doctrine of *res judicata*, appellant was barred from relitigating his claim. Even if appellant's claim was not barred, however, the Court held that appellant was not entitled to a blood or genetic test to challenge paternity established by an affidavit of parentage. The Court looked to the language of FL § 5-1028 and FL § 5-1038 and found that a blood or genetic test could be used only to set aside a declaration of paternity under FL § 5-1038, and not paternity established by an affidavit of parentage under FL § 5-1028. The Court also noted that the legislative history of FL §§ 5-1028 and 1038 supported this conclusion.

Finally, appellant asserted that these statutory provisions created an inequity, namely, that one can challenge an enrolled declaration of paternity at any time through a blood or genetic test, whereas one who signs an affidavit of parentage may not rescind the affidavit after sixty days, except upon a showing of fraud, duress, or material mistake of fact. The Court responded that, given the clear intent of the legislature, the resolution of any alleged inequity is reserved solely for the General Assembly.

Paula Holden v. University System of Maryland, et al., No. 369, September Term 2014, filed April 3, 2015. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/cosa/2015/0369s14.pdf

LABOR AND EMPLOYMENT – ADVERSE EMPLOYMENT ACTION – IN GENERAL – PUBLIC POLICY CONSIDERATIONS IN GENERAL

Facts:

Appellant, Paula Holden, filed a complaint in the Circuit Court for Somerset County against appellees, the University of Maryland Eastern Shore ("UMES"), the University System of Maryland ("USM"), and her supervisor, alleging wrongful termination. Appellant was promoted as the Coordinator of Graduate Admissions and Programs at UMES. A year later, appellant's supervisor informed her that she needed to recruit new students into the graduate school within one academic year. Thereafter, appellant communicated to her supervisor that she believed Title III prohibited use of its funds for recruitment activities and therefore, appellant's employment could not be contingent upon participation in student recruitment activities.

In October 2010, appellant filed a grievance regarding the matter and the funding for her position was modified to reflect that only half of her salary was derived from Title III funds.

In September 2011, following a dispute with a co-worker, UMES placed appellant on administrative leave with pay for one calendar year, at which time her termination, without cause, would become effective. Thereafter, appellant filed a complaint in the Circuit Court for Baltimore City.

Following an order by the Circuit Court for Baltimore City to transfer the case to Somerset County, appellant filed an amended complaint, adding her supervisor and alleging one count for wrongful termination. Appellees moved to dismiss the amended complaint for failure to state a violation of a clear mandate of public policy. Following a hearing, the circuit court granted appellee's motion to dismiss, indicating that appellant failed to allege a clear mandate of public policy for the claim of wrongful termination.

Held: Affirmed.

The Court of Special Appeals held that the limitations provisions outlined in 20 U.S.C. § 1062(c) did not expressly indicate that recruitment activities would constitute an unauthorized use of Title III funds. Therefore, appellate failed to demonstrate a violation of a clear mandate of public policy. Additionally, the law does not allow recovery for wrongful discharge based on an employer's belief that the act the employee objects to is unlawful, unless the act is in fact unlawful.

Michael Diffendal, et al. v. Department of Natural Resources, et al., No. 512, September Term 2014, filed April 6, 2015. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2015/0512s14.pdf

NATURAL RESOURCE ARTICLE, TITLE 4, SUBTITLE 11A – FISH AND AQUACULTURE LEASES – APPLICATION AND APPROVAL PROCESS – COMMON LAW PUBLIC TRUST DOCTRINE.

Facts:

The General Assembly enacted legislation promoting commercial rearing of fish and aquatic plants for sale, barter, or shipment by means of aquaculture leases. Donald Marsh, Jr., an appellee, applied for a water column lease in the Chincoteague Bay to raise oysters. The application underwent a three-year review process by the Department of Natural Resources ("DNR"), also an appellee, which found that it met the statutory criteria. Notice was given and appellants, nearby residents, property owners, and commercial watermen, protested, seeking a contested case hearing. The hearing was conducted by an ALJ for the Office of Administrative Hearings, who was given final agency decision making authority. The ALJ found that the application was for a submerged land lease, not a water column lease; that the statutory criteria for approval were the same; that the statutory criteria all were satisfied; but that the common law public trust doctrine applied, and under that doctrine the lease application would be denied. On judicial review, the Circuit Court for Anne Arundel County reversed.

Held: Affirmed.

The lease applied for was a water column lease, not a submerged land lease. The ALJ's error in that regard made no difference as the statutory criteria for approval were the same. The evidence established that the statutory criteria all were satisfied. The ALJ's determination that the common law public trust doctrine applied was legally incorrect. Under that doctrine, the State holds the navigable waterways within Maryland's boundaries and the land beneath them for the benefit of the inhabitants of Maryland; acts as the proprietor of those waters and as a quasi-trustee for the public's rights of navigation and fishery; and has the power to regulate the use of those waters and the land beneath them (subject to the paramount power of the federal government). By enacting subtitle 11A, the State was exercising its regulatory powers under the public trust doctrine. Accordingly, when an applicant for an aquaculture lease satisfies the statutory criteria, the public trust doctrine does not come into play to impose additional, extra-statutory restrictions. Upon proof that the statutory criteria are satisfied, the only basis to deny the application is a finding of reasonable cause that denial is necessary to protect the public health, safety, and welfare, a standard imposed by section 4-11A-09(d)(4) of subtitle 11A. There was no competent evidence presented at the contested case hearing that granting the lease

application would endanger the public health, safety, and welfare. Therefore the ALJ erred as a matter of law in denying the lease application.

Return to ToC

Supervisor of Assessments of Montgomery County v. Ann Lane, No. 1388, September Term 2013, filed April 2, 2015. Opinion by Eyler, James R., J.

http://www.mdcourts.gov/opinions/cosa/2015/1388s13.pdf

TAX-GENERAL – PROPERTY TAX

Facts:

After appellant reassessed the value of appellee's real property, appellee pursued administrative appeals, to and including the Maryland Tax Court. Unhappy with the decision of the Tax Court, appellant filed a petition for judicial review in the Circuit Court for Montgomery County. The circuit court held that the Tax Court had erred in considering sales of property that occurred after January 1, 2011, the "date of Finality." The date of finality is the January 1 when assessments become final for the tax year next following. Md. Code, Tax-Prop., sections 8-104 (b) (2) and 1-101 (qq).

Held: Reversed.

The above statute did not bar consideration of sales that occurred subsequent to the date of finality. The Tax Court did not err in considering such sales because the sales were reasonably close in time and otherwise comparable.

Tyron White v. Kennedy Krieger Institute, Inc., No. 1015, September Term 2013, filed February 26, 2015. Opinion by Friedman, J.

http://www.mdcourts.gov/opinions/cosa/2015/1015s13.pdf

FRAUDULENT MISREPRESENTATION – INDIRECT RELIANCE BY INFANT

NEGLIGENT MISREPRESENTATION – INDIRECT RELIANCE BY INFANT

MARYLAND CONSUMER PROTECTION ACT – LIABILITY FOR SOMEONE WHO IS NOT THE DIRECT SELLER OF THE CONSUMER PRODUCT

Facts:

This case arises out of a research study conducted by the Kennedy Krieger Institute in Baltimore City in the 1990s called the Treatment of Lead-Exposed Children Study. The study involved two components: (1) to evaluate the effects of the oral chelating agent, succimer, on moderately lead poisoned children; and (2) to evaluate benefits of residential lead clean-up and nutritional supplementation for these children. Kennedy Krieger told parents that, as part of their participation in the study, trained professionals would inspect their home for the presence of lead dust and chipped paint, "clean-up the lead dust in your home," provide the child with vitamins and minerals, provide regular medical check-ups for the child, check the child's blood lead levels "regularly and carefully," and in certain instances, provide parents with information on how to relocate to "lead safe" housing.

Appellant Tyron White alleges that as a minor enrolled in the study, and as a result of the tortious conduct of Kennedy Krieger, he was exposed to harmful levels of lead that caused irreparable brain injuries. In particular, White alleged that KKI failed to inform White's parent of ongoing lead risks in their home, even after the professional cleaning, and falsely represented that certain properties were "lead safe" although the properties were not completely free from lead. The trial court dismissed White's claims of fraudulent misrepresentation, intentional misrepresentation, and violation of the Maryland Consumer Protection Act. The remaining claim of negligence went to the jury, who found in favor of Kennedy Krieger.

Held: Affirmed.

1. Proposed Jury Instructions Based on *Grimes v. Kennedy Krieger Institute* – The TLC Study was a therapeutic study, taking it out of the factual scope of *Grimes v. KKI*. Therefore, White's requested jury instruction taken from *Grimes* is not factually applicable and the trial court did not err in declining to give it.

2. **Proposed Jury Instructions Based on Federal Regulations –** There was no abuse of discretion by the trial court in denying the requested instructions as they pertained to a federally regulated informed consent issue that was not before the jury at the time.

3. **Fraudulent Misrepresentation –** Parental reliance can be imputed to the infant as a form of indirect reliance when the misrepresentation is designed to cause actions by, or on behalf of, the infant.

4. **Negligent Misrepresentation –** Restatement (Second) of Torts § 311 (1965) establishes that an actor may be liable in tort to a third party who neither hears, nor directly relies on any misrepresentation by the actor. Instead, the element of reliance necessary for a negligent misrepresentation claim can be satisfied indirectly by the reliance of the "other" who acts in reliance on the misrepresentation of the actor.

5. **Sufficiency of Evidence –** There was no evidence that properties on a lead safe list were represented to TLC Study participants as lead free. No reasonable jury could find that KKI represented to Ms. Riddick that she would receive lead free housing by allowing White to participate in the TLC Study.

6. **Maryland Consumer Protection Act –** The trial court erred in requiring White to show a direct consumer transaction between White and KKI for liability to attach under the CPA. Instead, the proper inquiry is whether KKI's actions regarding the leased properties were sufficiently integral to "so infect the sale or offer for sale" that a claim of consumer fraud under the CPA can survive a motion for judgment. Whether a party's involvement is sufficiently integral to a sale of consumer goods to bring it within the purview of the CPA is a determination based on the specific factual circumstances of each case.

In this case, however, no reasonable jury could have found that KKI misrepresented to Ms. Riddick that "lead safe" meant that the property was completely free from lead hazards, and would remain free from lead hazards. Rather, KKI accurately described the presence of lead in the home. Therefore White's CPA claim was properly dismissed.

Nycole Davis, Individually and as Personal Representative of the Estate of Ashley Davis, a minor, and Jerome Bradley v. Board of Education of Prince George's County, et al., No. 8, September Term 2014, filed April 3, 2015. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2015/0008s14.pdf

DUTY OF CARE IN TORT ARISING UNDER STATUTE OR ORDINANCE RULE – JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV), RULE 2-532 – WAIVER – MOTION TO REDUCE VERDICT BASED ON STATUTORY IMMUNITY – PROOF OF INSURANCE AND LIMITS FOR PURPOSES OF STATUTORY IMMUNITY – REMITTITUR – REDUCTION OF DAMAGES BASED ON AMOUNT PAID IN SETTLEMENT BY A NON-PARTY

Facts:

As a 13-year-old public school student was crossing a four-lane highway to catch the bus to school, she was struck and killed by a car. The student's estate and her parents brought survival and wrongful death actions against the county board of education ("Board"), which had undertaken to provide school buses for public school students. The case was tried before a jury, which found that the Board was negligent and that the student was not contributorily negligent and did not assume the risk; and awarded over $90 million dollars in damages. The Board filed a motion for JNOV, which the court granted. The court ruled that the Board did not owe a duty of care to the student and, if it did, the student was contributorily negligent as a matter of law. The court further ruled, in the alternative, that damages were capped at $100,000 pursuant to the immunity statutes for county boards of education, and if those statutes did not apply, the amount of the verdict shocked the conscience of the court and would be remitted to $166,000.

Held: JNOV on liability reversed.

COMAR 13A.06.07.13C requires that, for school bus routes on a four-lane highway, a bus must pick up and discharge students on both sides of the street. Under the Statute or Ordinance Rule, this regulation created a duty of care by the Board to the students assigned to take the Board's buses to school, which included the decedent. The evidence at trial was sufficient to prove that the Board breached this duty of care and that the student's death was proximately caused by the breach. The issue of contributory negligence was waived for purposes of the JNOV motion, because it was not raised in a motion for judgment at the close of the evidence. The issue lacked merit in any event.

Rulings on damages vacated and remanded for further proceedings. Sections 5-518 of the Courts and Judicial Proceedings Article and 4-105 of the Education Article waive sovereign immunity

for county boards of education for damages up to the limits of a privately held insurance policy or up to $100,000 if the county board is self-insured or insured through a qualified pool. The Board did not waive its right to request a reduction of the verdict based on these statutes by not including such a request in its motion for judgment at the close of the evidence. The court properly could consider the Board's request to reduce the damages award as made in the JNOV motion. However, the mere representation by the Board's counsel that the Board was insured through a pool was not sufficient to prove how and to what extent the Board was insured. Because sovereign immunity may be raised at any time, the case is remanded for a damages hearing in which competent evidence of the Board's insurance will be considered. If no such evidence is introduced, the Board will not be entitled to a reduction of the verdict under these statutes.

The Board's request for a remittitur was not properly made and should not have been considered and granted by the court. When the defendant has moved for a new trial on the ground that the amount of the verdict shocks the conscience, and the court agrees, the plaintiff may agree to accept a remittitur in lieu of a new trial. There was no motion for new trial filed in this case.

The court erred in ruling that the amount of damages would be reduced by the $20,000 settlement paid by the driver of the car that struck the decedent. The release given denied tortfeasor status and there was no finding of tortfeasor status of the driver at trial, so as to warrant a reduction under the Uniform Contribution Among Tortfeasors Act.

Injured Workers Insurance Fund v. Subsequent Injury Fund, et al., No. 358, September Term, 2014 and *Baltimore County, Maryland v. Subsequent Injury Fund, et al.*, Nos. 1258, September Term 2014, filed April 3, 2015. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2015/0358s14.pdf

WORKERS' COMPENSATION – STATUTORY REGULATION

STATUTES – INTENT

Facts:

This consolidated appeal arises from decisions of the Workers' Compensation Commission ("Commission") in two separate cases concluding that, pursuant to Md. Code (1991, 2008 Repl. Vol.), Labor & Employment Article ("LE"), employers must compensate appellee, the Subsequent Injury Fund ("SIF"), a 6.5% assessment based on the Commission's entire award to the employee, not merely the amount payable after any offsets for retirement benefits. The employer in the first case, appellant, Maryland Transit Administration ("MTA"), filed a petition for judicial review of the Commission's decision regarding MTA employee Salvatore Glorioso's claim in the Circuit Court for Baltimore City on December 26, 2013. Following a hearing on April 21, 2014, the Circuit Court for Baltimore City affirmed the Commission's decision. The employer in the second case, appellant, Baltimore County ("County"), filed a petition for judicial review of the Commission's decision regarding County firefighter Gary Shipp's claim in the Circuit Court for Baltimore County on December 18, 2013. Subsequently, the County and SIF filed cross-motions for summary judgment. Following a hearing on July 29, 2014, the Circuit Court for Baltimore County granted SIF's motion and denied the County's. Both MTA and the County timely appealed

Held: Affirmed.

LE § 9-806(a) requires employers to compensate SIF with a 6.5% assessment based on the full amount of the Commission's award to the employee for permanent disability or death, and not merely based on the amount payable after any offsets for retirement benefits. Had the General Assembly intended to limit SIF's assessment to the "amount payable" under the award, it could have specified as such.